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In the
Supreme Court of the United States

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205; MONICA STEPHAN, ANNELISA CLEARY, et al.,
Petitioners,

v.

KELLY BAIRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

NANCY FREDMAN KRENT
Counsel of Record
ROBERT E. SWAIN
HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN
3030 SALT CREEK LANE
SUITE 202
ARLINGTON HEIGHTS, IL 60005
(847) 670-9000

Counsel for Petitioners Monica Stephan, Annelisa Cleary, et al.

STEPHEN R. MILLER
LAURA L. SCARRY
MYERS, MILLER AND KRAUSKOPF
TWO NORTH LASALLE STREET
SUITE 1200
CHICAGO, IL 60602
(312) 345-7250

Counsel for Petitioner Board of Education for Warren Community School District No. 205

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether an action for breach of contract constitutes adequate post-termination process for a contractual employee following a pre-termination *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) hearing, or whether, as the Seventh Circuit held, a breach of contract action is insufficient post-termination process where no remedy of reinstatement is available?

2. If a breach of contract action is not adequate post-termination process, was the employee's right to a full trial-type pre-termination hearing "clearly established" so as to deprive the individual defendants of qualified immunity, as the Seventh Circuit held?

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioners: Board of Education, Warren Community Unit School District 205
Monica Stephan
Annelisa Cleary
Judy Gates
Mary Vincent
Joseph Green
Donald Hill
Robert Lethlean

Respondent: Kelly Baird

STATEMENT PURSUANT TO RULE 29.6

Petitioners are a governmental corporation and public officials, and thus no disclosure statement is required pursuant to Rule 29.6.

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OPINIONS BELOW

The opinion of the court of appeals (App. 2a-20a) below is reported at 389 F.3d 685. The order denying rehearing (App. 1a) is unreported. The opinions of the district court denying petitioners' Motion to Dismiss (App. 27a-30a) and granting their Motion for Summary Judgment (App. 21a-26a) are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Seventh Circuit Court of Appeals sought to be reviewed was issued on November 12, 2004. On December 29, 2004, the Seventh Circuit Court of Appeals entered its Order denying the Petition for Rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Constitution, 14th Amendment

> Section 1 * * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. * * *

42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States

or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress * * *

105 ILCS 5/10-23.8

Superintendent contracts. *** By accepting the terms of a multi-year contract, the superintendent waives all rights granted him or her under Sections 24-11 through 24-16 of this Act [105 ILCS 5/24-11 through 105 ILCS 5/24-16] only for the term of the multi-year contract. Upon acceptance of a multi-year contract, the superintendent shall not lose any previously acquired tenure credit with the district.

STATEMENT OF THE CASE

Plaintiff, Kelly Baird, was hired as superintendent and principal of Warren School District pursuant to a three-year employment contract which specifically included a provision allowing for termination for cause. (App.45a-57a, Contract Sections E1 and E3, 53a-54a). At the conclusion of his first year, the Board evaluated him and, in a detailed written evaluation, found his performance unacceptable. (App. 31a-44a). Concerns with his performance included: lying to the Board about applying for a needed county grant, lack of support for new teachers, ineffective student discipline, destruction of District files, and absence and tardiness concerns. *Id.*[1]

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[1] The Superintendent refused to attend his performance review, although attendance was required by his contract. See App. 54a, Section F.

Based on these concerns, the Board provided Baird with notice that it would conduct a hearing to consider terminating his employment, and informed him that the grounds for considering his termination were the grounds set out in his written evaluation. (App. 4a) The Board invited Baird to attend the hearing to present his case to the Board. *Id.*

The superintendent refused to meet with the Board. He appeared with his attorney before the hearing began to object to its form; he then left the room and refused to participate. *Id.* The Board went forward with the hearing, and found that there was just cause to terminate his employment.[2] *Id.*

Baird filed suit in state court, claiming breach of contract and challenging the procedural due process implications of the Board's actions. (App. 5a) Specifically, the Complaint raised two due process issues: whether the Board provided Baird with sufficient pre-termination process, and whether certain Board members who had been critical of his job performance were unconstitutionally "biased" against him. The Defendants removed the case to Federal Court. After the close of discovery, the district court granted summary judgment in favor of Defendants on both issues, and remanded the case to state court for trial on the breach of contract claim. *Id.*

The Seventh Circuit of Appeals affirmed the District Court's judgment denying the bias claim. The Court reversed the District Court's judgment on the remaining procedural due process claim, however, and held that despite conducting a pre-

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[2] The employment contract between the parties defined cause as "any conduct, act or failure to act by the Superintendent which is detrimental to the best interests of the School District" (App.54a, Contract Section E3).

termination hearing affording Baird substantial process to defend himself, consistent with *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Board had failed to provide him with due process. The Court held that a breach of contract action following a pre-termination *Loudermill* hearing is not sufficient to provide adequate post-termination due process, where state remedies do not include reinstatement, and therefore that the Board of Education was required to provide a full trial-type pre-termination hearing. This analysis was based upon a holding that the Plaintiff had an intangible property right to "remain[] in office" (App. 12a) that was not sufficiently protected by a breach of contract action.

Even though no federal court had ever previously held that a breach of contract action is insufficient post-termination procedure in an employment case, the Court also concluded that Baird's right to a full trial-type proceeding prior to termination was so clearly established as to deny qualified immunity to the individual Board members named as defendants. The Court also concluded that, even though the employee had refused to attend his pre-termination hearing, he had not waived his right to challenge it.

REASONS FOR GRANTING THE PETITION

In this case, the Seventh Circuit concluded that state court judicial review of a termination is insufficient post-termination process within the meaning of *Loudermill*, where reinstatement is not available as a remedy. Accordingly, the Court held that a public employer must provide full trial-type pre-termination procedures of its own in addition to defending itself in court. No other court has held that a trial in state court is insufficient to constitute adequate post-termination process for a public employee. The Court's decision rests on the erroneous assumption that due process protects not only a public

employee's economic interest in his employment, but also separately protects purely dignitary and non-pecuniary dimensions of employment. The Court's decision here creates a new right to "remain in office" requiring a remedy of reinstatement, separate and apart from a right to be compensated for any losses the employee suffers.

The Seventh Circuit's decision should be reviewed by this Court because its ruling, which directly contravenes Supreme Court precedent both on the merits and on the issue of qualified immunity, raises significant potential new liabilities for public bodies and individual public officials throughout the country. The decision also creates a clear conflict among the Circuits on the question whether the non-economic benefits of government employment are separately protected property interests. On the merits of the procedural due process claim, the Seventh Circuit's ruling disregards the teachings of cases from *Loudermill* to *Gilbert v. Homar*, 520 U.S. 924 (1997) and announces a sweeping new rule of law whose premises conflict with the holdings of other circuits, as well as other decisions of its own court. On the qualified immunity question, the Seventh Circuit has ignored this Court's fundamental precedents, denying qualified immunity to individual school board members without identifying any precedent or ruling that would have suggested that its novel holding approaches the "clearly established" standard demanded by this Court.

A. Because the Seventh Circuit's Decision Imposes Significant New Liabilities on Public Bodies and Public Officials, This Case Raises Issues of Critical Importance

The new requirements of procedural due process announced by the appellate court present an issue of critical importance to school districts and other public bodies throughout the country, as the decision has drastically altered the landscape of

procedural due process. By its ruling, the appellate court, for the first time, imposed the burden of a full trial-type pre-termination hearing on thousands of public bodies seeking to terminate contractual employees, at least in the vast majority of states, where state contract law does not include the remedy of reinstatement for a breach of contract claim. Since virtually all superintendents and senior level municipal, regional and state administrators, both in school districts and other public bodies, are employed through employment contracts, not through civil service or tenure systems, this decision will have a profound impact on thousands of government entities and employees.

The Seventh Circuit's opinion also raises substantial federalism concerns. The contract law of most states, based as it is in common law, does not give employees suing for breach of contract a right to reinstatement. See e.g., S. Williston, Treatise on the Law of Contracts § 67:102, p. 568 (Richard Lord, author, 4th Ed., 2002). Thus, the Seventh Circuit casually dismissed state courts throughout the country as incapable of providing adequate post-termination relief to contractual employees. This holding flies in the face not only of repeated statements by this Court of the dignity to be accorded state court proceedings, but of the doctrine of federalism itself. The property interest in this case was created simply from an employment contract between the school board and the superintendent. By holding that the state law breach of contract action was not adequate post-termination process, the Seventh Circuit has removed from the states their right to determine for themselves the appropriate remedies to be accorded for the breach of employment contracts, a traditional area of state authority, thus creating a fundamental, and unjustified shift of power from state to federal courts. As the Third Circuit has commented "a wholesale federalization of state public contract law seems far afield from the great purposes of the due process clause." *Reich v. Beharry*, 883 F.2d 239, 242 (3d Cir. 1989).

The Seventh Circuit's opinion also raises important questions of qualified immunity, by depriving public officials of immunity for being unable to foretell the court's pronouncement of this new right to remain in one's position. In its opinion, the appellate court itself acknowledged that only "a fine line distinguishes factual scenarios in which a judicial remedy for breach of contract is adequate [post-termination process] from those in which it is not." 389 F.3d at 691. The court then failed to identify a single prior case in which the factual scenario it confronted, the adequacy of a breach of contract claim as post-termination relief in an employment context, had ever been decided. Indeed, no such prior case exists. Qualified immunity serves several important purposes – "it allows officials to carry out their duties confidently, without fear of incurring unexpected liability, and it allows courts to dispose of insubstantial claims prior to trial, sparing officials from unnecessary litigation." *Pounds v. Griepenstroh*, 970 F.2d 338, 340 (7th Cir. 1992). The appellate court here ignored those compelling purposes, and imposed liability on board members who, it held, guessed wrongly on which side of the "fine line" their situation fell. Such a ruling puts all local public officials at risk. This not only impacts current officials, who may be chilled in carrying out their duties, but also discourages other citizens from running for public office at all. Thus, this decision raises issues of paramount importance, and should be reviewed.

B. The Seventh Circuit's Decision Conflicts With Decisions of Other Courts of Appeals

The Seventh Circuit's conclusion, that the non-pecuniary elements of a public employee's job require the availability of a remedy of reinstatement, separate and apart from the right to compensation for monetary losses, conflicts with numerous decisions of other courts of appeals. In these cases, dealing with suspensions with pay, contract pay-outs and unilateral job

transfers, the courts have repeatedly denied claims for violation of due process, finding that, so long as compensation is awarded, due process is satisfied. *Holloway v. Reeves*, 277 F.3d 1035, 1039 (8th Cir. 2002); *Harris v. Board of Education of the City of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992); *Royster v. Board of Trustees of Anderson County School District*, 774 F.2d 618 (4th Cir. 1985). This Court suggested as much in *Loudermill* itself, noting that the public employer could have avoided the need for any pre-termination procedures if it had imposed a suspension with pay. Such a determination would not be possible if the Seventh Circuit's newly created right to remain in office were in fact a cognizable right.

Numerous decisions, from this Court and the appellate courts, have rejected the Seventh Circuit's premise, holding that the federal due process clause does not protect one's right to continue serving in a particular job. *Loudermill*; *Gilbert v. Homar*, 520 U.S. 924 (1997) (re-emphasizing *Loudermill*'s language regarding suspensions with pay, and holding that not even all suspensions without pay require pre-termination process); *Holloway v. Reeves*, 277 F.3d 1035 (8th Cir. 2002); *Harris v. Board of Education of the City of Atlanta*, 105 F.3d 591 (11th Cir. 1997); *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992); *Royster v. Board of Trustees of Anderson County School District*, 774 F.2d 618 (4th Cir. 1985). Each of these Court of Appeals cases involved claims by a school superintendent that he was entitled to due process before the non-economic elements of his job could be taken from him. In each case, the court specifically rejected that claim, finding that only economic benefits of the position

are protected property interests. The Seventh Circuit's opinion in this case stands in direct conflict to each of these holdings.[3] For example, the Fifth Circuit, in *Kinsey v. Salado Independent School District*, 950 F.2d 988 (5th Cir. 1992), considered the case of a superintendent removed from his position, but paid out on the monetary portions of his contract. The superintendent argued that he was entitled to due process before the paid removal from his position. The Court of Appeals flatly rejected that contention, concluding that an employee has no protectible interest in holding the position of superintendent, unless such an interest was specifically created by state statute, a situation present neither in *Kinsey* nor in this case. The court concluded that, by receiving the compensation to which he was due, Kinsey had received all that he had a right to claim under his contract. Likewise, in this case, if the employee recovers for the asserted breach of contract, he will have received all that he had a right to claim under his contract.[4]

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[3] The Seventh Circuit's decision here similarly conflicts with the previous decisions issued by that Court itself. *See Bordelon v. Chicago School Reform Board of Trustees*, 233 F.3d 524 (7th Cir. 2000), *Crim v. Board of Education*, 147 F.3d 535 (7th Cir. 1998), and *Swick v. City of Chicago*, 11 F.3d 85 (7th Cir. 1993). The Court held in all three of those cases that due process does not protect "the purely dignitary or otherwise nonpecuniary dimensions of employment," *Bordelon*, 233 F.3d at 530; *Crim*, 147 F.3d at 546; *Swick*, 11 F.3d at 87. *See also Ulichny v. Merton Comm. Sch. Dist.*, 249 F.3d 686, 702 (7th Cir. 2001) (no protected property interest in performing the duties of principal).

[4] In this case, the Board contends that the contract was not breached; that it was entitled to terminate the contract pursuant to section E1, which allows termination for cause. (App. 53a). If there is cause for termination, then the employee is entitled to recover no additional compensation.

In *Holloway v. Reeves*, 277 F.3d 1035, 1039 (8th Cir. 2002), the appellate court specifically addressed the reasons why a superintendent has no protectible interest in the non-economic aspects of his employment contract: "no superintendent could 'legitimately' expect to continue in that position at *any* school district beyond the pleasure of the school board, as school boards and other public bodies frequently 'buy out' the contracts of top managers. Any alleged property interest in a public policy-making position itself, that is, in addition to being paid, if it were recognized, would severely limit the right of the electorate, through its chosen representatives, to control the operation of public institutions." It is precisely these concerns that the Seventh Circuit disregarded in creating this new property interest.

The conflict raised here is one that should be resolved by this Court. This is not simply a theoretical concern; it is one of practical and frequent significance. Literally thousands of public school districts and municipalities, and their superintendents and other contractual employees, confront this question regularly, as these local governments determine what pre-termination process they must provide in dismissal situations. The current state of the law leaves them unsure how to proceed, and many public employers may expend significant amounts of time and taxpayer dollars holding full trial-type pre-termination hearings they are not constitutionally required to hold. *Cf.*, *Beischel v. Stone Bank School District*, 362 F3d. 430 (7th Cir. 2004) (12-hour, all-night pre-termination hearing of superintendent). Accordingly, the petition for certiorari should be granted.

C. The Seventh Circuit's Decision Contains Significant Errors of Law.

1. A Post-Termination Breach Of Contract Action Is Constitutionally Sufficient Post-Termination Process For A Contractual Employee

The Court of Appeals in this case held that a pre-termination *Loudermill* hearing, coupled with a post-termination action for breach of contract, is insufficient process for a contractual employee as a matter of constitutional law, unless reinstatement is available as a remedy. This conclusion – the first of its kind in the country – is a stark departure from well-settled law defining the procedural due process rights of public employees.

By virtue of his contract with the Board, the employee in this case had a protected property interest in his employment and the Board could not deprive him of that interest without due process. *Loudermill*, 470 U.S. at 542. This Court held in *Loudermill* that a public employee who is provided with a full evidentiary post-termination hearing is entitled only to notice, a summary of charges, and an opportunity to be heard prior to termination. *Loudermill*, 470 U.S. at 546. In *Loudermill*, the Court explained that a public employee who enjoys a property interest in continued employment must be afforded "some opportunity ... to present his side of the case." *Loudermill*, 470 U.S. at 543. *"To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." Id.* at 546.

The Board here provided the employee with a pre-termination hearing that far exceeded these requirements. The employee was given the opportunity to present his case at a hearing; to present evidence and witnesses; to cross-examine

witnesses; to testify himself as to what absent witnesses might say; and to bring a legal representative to the hearing. In addition, the employee had available as post-termination process the full judicial process attendant to a state court action for breach of contract – not just "trial-type" procedures, but an actual trial.

The Seventh Circuit's conclusion that the employee's post-termination remedy must include a right to reinstatement is based on a misunderstanding of the phrase "present entitlement," as used in this Court's decision in *Arthur S. Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 190, 196 (2001). In *Lujan*, this Court held that the state could provide *no* pre-termination process, and simply provide post-termination judicial process through a breach of contract action, to independent contractors from whom certain payments had been withheld. The Court noted that due process did not always include a right to pre-termination as well as post-termination process. The Court cited two earlier cases in which it had held post-termination process without any pre-termination process was sufficient, where employment claims had been at issue. *FDIC v. Mallen*, 486 U.S. 230 (1988); *Barry v. Barchi*, 443 U.S. 55 (1979). In those cases, although no pre-termination process had been provided, sufficiently prompt post-termination relief was adequate even absent pre-termination process. *Barchi* and *Mallen* stand for the proposition that in those rare circumstances when *no* pre-termination process is given an employee with a property interest in his position, post-termination relief must be exceptionally prompt.

The Court noted that, because the plaintiff in *Lujan* was not "presently entitled" to "exercise ownership dominion over real or personal property, or to pursue a gainful occupation," *Lujan*, 532 U.S. at 196, the lack of pre-termination process was not fatal, similar to the holdings in *Barchi* and *Mallen*. Nothing in

Lujan, Barchi, or Mallen suggests that a post-termination contract remedy, when coupled with substantial pre-termination process, is insufficient to protect the rights of terminated contractual employees, whether or not that contract remedy includes reinstatement. To the contrary, this Court, in *Lujan* and other cases, has strongly endorsed the ability of state courts to protect rights created by contract. *Lujan*, 532 U.S. at 197.

The Court of Appeals decision in this case, however, turns *Lujan* on its head. The appellate court read the phrase "present entitlement" to mean that the public employee has a right to "remain[] in office," separate and apart from his right to be compensated for the alleged breach of his employment contract. App. 12a. This right, according to the court, could not be compensated by damages, but rather, requires the availability of a remedy of reinstatement. This right arises, apparently, because the holding of a particular position is so important, according to the Seventh Circuit, that post-termination relief is insufficient unless reinstatement is available as a remedy.

The new rule announced by the Seventh Circuit amounts to a determination that ordinary contract remedies do not satisfy due process, even when the property interest arises solely from a contract, and instead requires a federal approval of each remedial element. Thus, the breadth of remedies (as opposed to the type of process) available ex post define the amount of process ex ante. The Seventh Circuit now demands that, to satisfy *Loudermill*, the remedial options include reinstatement. The next federal court might require the inclusion of attorneys' fees. A third might demand that damages not include a mitigation requirement. Clearly, due process does not require the federalization of state contract law and state court practice. Indeed, *Loudermill* itself makes this clear. This Court noted that the post-termination relief granted to one of the plaintiffs, Donnelly, did not include back pay, and the Sixth Circuit had

determined that the reviewing commission had lacked the authority to award such compensation. 470 U.S. at 537, n.1. Even though Donnelly could not thus fully be made whole, as he would only get reinstatement without back pay, this Court found that this proceeding would be sufficient post-termination relief, coupled with limited pre-termination process. Due process would be satisfied even where Donnelly was not fully made whole; it therefore must be satisfied where the employee in this case can be fully made whole, with back pay for the entire duration of his contractual term.[5] Nothing in *Lujan*, or any other decision of this Court, should have led the Seventh Circuit to conclude otherwise.

It is important to recognize that the employee's property interests here were created and defined solely by his employment contract with the Board, which entitled him to a three-year term of employment. Illinois law specifically provides that school superintendents are not entitled to tenure when serving under a multi-year employment contract, 105 ILCS 5/10-23.8, and the employment contract included a specific provision to the same effect. Nothing in the Illinois School Code creates any claim of entitlement to the non-monetary aspects of the superintendent's position, and the employee in this case pointed to no such statutory entitlements in pleading his case. Furthermore, under Illinois law, as is true in most states, the proper remedy for breach of an employment contract is an action for damages, not an action seeking reinstatement. *Bessler v. Board of Education*, 69 Ill.2d 191,

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[5] For a tenured civil servant, monetary compensation, for only a limited period, does not fully compensate for the loss of a position that could have continued indefinitely. In the present case, by contrast, the employee had a contract for a fixed period of time, and so the calculation of the full scope of his monetary losses is clear.

198-99, 370 N.E.2d 1050, 1053-54, 13 Ill.Dec. 23, 26-27 (1977); *Zannis v. Lake Shore Radiologists, Ltd.*, 73 Ill.App.3d 901, 904-05, 392 N.E.2d 126, 128-29, 29 Ill.Dec. 569, 571-72 (1st Dist. 1979).[6] Thus, the Panel's decision awards the employee a remedy that his state-created property interest never provided.[7]

The Seventh Circuit erred by finding that due process requires a full trial-type pre-termination hearing for this contractual public employee, simply because his post-termination relief, a full state court trial on his breach of contract claim, did not include the remedy of reinstatement. This decision, which was based on an apparent misinterpretation of this Court's decision in *Lujan*, not only conflicts with established precedent in other circuits, it undercuts the state's

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[6] It is also significant that the employee has *never* sought reinstatement to his position. Indeed, the complaint – which was filed June 25, 2001, less than six weeks after his employment had been terminated – sought only money damages.

[7] The court also held, apparently as a matter of law, that state court legal proceedings could never provide sufficiently prompt relief. Such a finding is as unjustified as it is novel. This Court and others have held that even a one-year delay satisfies due process, *Loudermill*, 470 U.S. 532 (1985); *DeVito v. Chicago Park District*, 972 F.2d 851, 857-58 (7th Cir. 1992). There is no evidence in the record that the employee in this case could not have pursued his action for breach of contract in Jo Daviess County, a small county in Western Illinois, where it was filed, within an equivalent timeframe. Although the Court claims to look to *Lujan*, 532 U.S. at 196, as a basis for its decision, nothing in *Lujan* suggests such a result – to the contrary, *Lujan* endorses the constitutional sufficiency of state contract actions as adequate post-termination proceedings.

right to establish the parameters of its own contract law. For these reasons, the Court should grant the petition for certiorari.

2. The Denial of Qualified Immunity Directly Violates This Court's Consistent Requirement of a "Clearly Established" Constitutional Violation

After announcing its novel holding that a state court breach of contract action is insufficient post-termination process for *Loudermill* purposes, the Seventh Circuit concluded that this new proposition was a "clearly established" constitutional right. As a result, it held that the school board's decision to provide a Loudermill-type pre-termination hearing violated that clearly established right, and denied qualified immunity to the individual board members. That ruling plainly contravenes this Court's decisions on qualified immunity, from long-standing precedents such as *Harlow v. Fitzgerald,* 457 U.S. 800 (1982) and *Anderson v. Creighton,* 483 U.S. 635 (1987) to more recent decisions in *Saucier v. Katz,* 533 U.S. 194 (2001) and *Brousseau v. Haugen,* 125 S.Ct. 596 (2004).

In *Saucier*, this Court emphasized that questions of qualified immunity must be resolved through a careful two-part analysis. In particular, the second part of this analysis – whether a public official has violated a "clearly established" right – "must be undertaken in light of the specific context of the case, not as a broad general proposition." *Saucier*, 533 U.S. at 201. The Seventh Circuit's analysis completely disregards this requirement. The decision denied qualified immunity to the individual defendants because "numerous cases from *Perry v. Sindermann* to *Loudermill* to *Lujan* ... have defined the contours of what process is due to a public employee who is to be terminated." App. 20a. Notwithstanding "the quality and volume of this precedent," *id.*, none of that precedent concerned the "specific context" here. The issue was not whether the

employee was generally entitled to due process, or even whether he was entitled to some kind of a hearing. The issue the Court of Appeals was to decide was whether a reasonable school board member should have been able to discern that the available judicial process was insufficient post-termination process under *Loudermill*.

No reported decision before the Seventh Circuit's opinion here had held that judicial process through an action for breach of contract fails to satisfy *Loudermill*'s requirement for adequate post-termination process. In fact, as noted in Sections B and C1, *supra*, prior holdings of this Court and other Courts of Appeals should have led to the opposite conclusion. Similarly, the district court, reviewing the same precedent and facts as the appellate court, had specifically concluded that the state court remedy was sufficient, and granted summary judgment to the Defendants. Furthermore, in other contexts, a breach of contract remedy has been specifically approved as adequate post-termination protection for a property right created by contract. *Lujan*, 532 U.S. at 197; *cf. Strasburger v. Board of Education*, 143 F.3d 351, 358 (7th Cir. 1998).

The question, quite simply, is whether it would have been apparent to local school board members that a pre-termination *Loudermill* hearing was insufficient pre-termination process when the post-termination process available was a full trial in state court on the employee's breach of contract claim. The answer is equally simple: it would not have been apparent. The Seventh Circuit's own opinion acknowledges the area to be "elusive" and "mysterious" and the circumstances dividing cases where state breach of contract claims are sufficient for due process purposes from those where it is not as a "fine line." App. 8a. The situation is virtually identical to that in *Brousseau v. Haugen*, decided by this Court earlier in the term, in which qualified immunity was deemed appropriate where the area of

law "is one in which the result depends very much on the facts of each case," and where the defendant's actions fell into a "hazy border", much like the "fine line" the Seventh Circuit noted here. 125 S.Ct. at 600.[8]

The Court's denial of qualified immunity thus violates the requirements of *Saucier*, as it was premised upon a level of generality not appropriate when analyzing qualified immunity. The Court relied on *Loudermill*, *Perry v. Sindermann*, and *Lujan* to support its conclusion that the requirement of an available reinstatement remedy was clearly established. Neither *Loudermill* nor *Perry* addressed the specific context at issue here – the adequacy of a post-termination breach of contract claim – and *Lujan* held, albeit in a different context, that post-termination breach of contract relief is sufficient even where no pre-termination process is offered. Thus, the cases cited by the Court of Appeals could not ensure that "a reasonable official would understand" that a breach of contract suit, with the full protections of a state court judicial proceeding, was not sufficient post-termination process, because reinstatement would

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[8] The Court's decisions denying qualified immunity in *Groh v. Ramirez*, 540 U.S. 551 (2004) and *Hope v. Pelzer*, 536 U.S. 730 (2002), similarly required a level of "apparentness" in the state of the law not present here. In *Groh*, where the issues involved the facial invalidity of a search warrant, the Court looked at the significant body of law -- the particularity requirement itself is set forth in the Constitution, the rule against warrantless searches of homes was well-articulated by the courts, and the defendant's own department had a rule prohibiting the conduct alleged – to conclude that the law was clearly established. In *Hope*, prior case law, a Department of Justice report and the Department of Corrections' own regulations all identified the practice in question as wrongful. No such prior precedent exists in this case.

not be available as a remedy. *Anderson v. Creighton,* 483 U.S. at 640.

The Seventh Circuit's decision not only disregards the legal principles governing qualified immunity, it undermines the purposes of the protection as well. This Court noted in *Anderson* the significant social costs imposed by damages actions against public officials: "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." 483 U.S. at 638. In this case, the public officials are local school board members, from a small town, serving their community for no compensation. To deny qualified immunity under the circumstances of this case, in a developing area of law, is to ask such volunteers to jeopardize their homes, their futures and their families' financial well-being. The doctrine of qualified immunity was intended specifically to shield our public officials from such risks.

CONCLUSION

The Court of Appeals decision in this matter dramatically changes the landscape for all public bodies in the country, in direct contravention of pre-existing law. Its ruling vastly expands the hearing rights of contractual employees and dramatically burdens local governing bodies seeking to remove employees they consider unsatisfactory. Moreover, even if this new pronouncement should be incorporated now into the legal principles of due process, in no manner was this settled law disqualifying the Board of Education members from qualified immunity.

For the reasons stated above, therefore, the Board of Education and its individual board members respectfully request that this Court grant the petition for *certiorari*.

Respectfully submitted,

Nancy Fredman Krent
Counsel of Record
Robert E. Swain
Hodges, Loizzi, Eisenhammer,
Rodick & Kohn
3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
Phone: (847) 670-9000

Stephen R. Miller
Laura L. Scarry
Myers, Miller and Krauskopf
Two North LaSalle Street, Suite 1200
Chicago, Illinois 60602
Phone: (312) 345-7250

Counsel for Petitioners

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3630
[Decided: December 29, 2004]

KELLY BAIRD,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT No. 205, et al.,
Defendants-Appellees.

Before: Hon. Richard D. Cudahy, Circuit Judge, Hon. Ilana Diamond Rovner, Circuit Judge, Hon. Ann Claire Williams, Circuit Judge.

ORDER

On consideration of the petition of Defendants-Appellees for rehearing with suggestion for rehearing *en banc* filed November 24, 2004, in the above-captioned case, all of the judges on the original panel have voted to deny rehearing and none of the active judges on the court have voted for a rehearing en banc.

Therefore, the petition for rehearing is DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 03-3630

[Decided: November 12, 2004]

KELLY BAIRD,
Plaintiff-Appellant,

v.

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205, JO DAVIESS COUNTY, ILLINOIS, MONICA STEPHAN, ANALISA CLEARY, JUDY GATES, MARY VINCENT, JOSEPH GREEN, DONALD HILL, and ROBERT LETHLEAN,
Defendants-Appellees.

Before: CUDAHY, ROVNER and WILLIAMS, Circuit Judges.

OPINION

CUDAHY, *Circuit Judge*. Here we confront the question whether a state breach of contract action provides adequate due process to protect the rights of a school superintendent

facing termination, whose pre-termination hearing fell short of due process requirements. For the reasons to be set forth, we conclude that, in the circumstances presented, it does not. We also hold that the superintendent to be terminated did not waive his procedural due process claim by attending his pre-termination hearing only to object to its procedures. Accordingly, we reverse.

I.

The parties to this conflict are the dual centers of authority that guide public education throughout the country. On the one hand is the school board, representing the people, and on the other hand, the school board's selected operating leader of the schools, the superintendent. In 2000, plaintiff Kelly Baird was hired by the Warren County School District No. 205 Board of Education to serve as Superintendent and Principal under a three-year contract that provided he could be dismissed only "for cause." (Superintendent/Principal Employment Contract at A.7.) The contract broadly defined "cause" as "any conduct, act, or failure to act by the Superintendent which is detrimental to the best interests of the School District." (*Id.* at A-8.) The contract also provided that reasons for discharge were to be given in writing to the Superintendent, who would then be entitled to notice and a pre-termination hearing before the Board to discuss the merits. (*Id.*)

Early in the school year, Baird found himself under close scrutiny by certain Board members, who in conjunction with their observations, began to collect a variety of deprecatory comments about Baird and his activities from secretaries, teachers and other district employees. This on-the-sly investigation of the new Superintendent continued throughout the school year until April of 2001, when the accumulated

tidbits of derogation were distilled into the form of Baird's annual performance review. Pursuant to the contract, on April 18, 2001, the Board presented Baird with its evaluation of his performance and a letter that notified him of its intent to terminate him for cause for the reasons contained in the evaluation and advised him of a hearing to consider his termination to take place on May 16, 2001.

Upon receiving this letter, Baird contacted his attorney, who promptly responded to the Board by letter requesting a continuance, copies of underlying documents, the names of individuals who had provided information included in the employment evaluation and the recusal of certain "biased" Board members who had led the investigative efforts against Baird. The Board in its reply denied these requests and stated further that it would not call witnesses, that it would not identify the individuals whose claims had provided the substance of the employment evaluation, that it could not compel any district employees to attend the hearing, that Baird was only entitled to "notice and the opportunity to be heard" and that Baird could question Board members only as to issues about which those members had spoken. In the final communication between the parties, which took place on the day of the hearing, Baird's attorney objected to the hearing procedures specified by the Board as unfair. That evening, when the Board convened to discuss his termination, Baird appeared with his attorney to protest what he claimed to be contractual and due process violations, and he then departed. The Board proceeded to consider Baird's termination in his absence, and predictably voted to end what had become an acrimonious employment relationship. Thereafter, it forwarded to Baird a copy of its Resolution of Termination.

Having been fired without receiving what he considered to be a fair hearing, Baird brought an action in state court

seeking damages against the Board pursuant to 42 U.S.C. § 1983, alleging that the Board's termination procedures violated his right to procedural due process. Baird claimed that certain Board members were biased against him and could not have served as neutral decision makers. He also asserted a breach of contract claim under Illinois law. After the Board removed the case to federal court, Baird filed a motion for partial summary judgment as to liability on his due process claim alleging an insufficient hearing, and the Board and Board members filed a motion for summary judgment on all claims. Thus, there were cross-motions on all issues save the issue of biased decision makers.

The district court granted the Board's motion and declined to exercise supplemental jurisdiction over Baird's common law breach of contract claim, remanding it back to state court. Citing *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985), the District Court stated that, provided there was a full due process hearing after termination, a pre-termination hearing need only provide notice of the charge, an explanation of the basis of the charge and an opportunity to respond. Baird's pre-termination hearing had satisfied these requirements. The district court concluded that here the state suit for breach of contract met due process requirements. In addition, the district court rejected Baird's allegations of bias, finding that his evidence had not overcome the presumption that Board members were acting in the public interest and that their concerns had stemmed from Baird's job performance and not personal animosity.

The issue here is whether a state breach of contract suit provides due process if the pre-deprivation hearing does not. We also turn to the question whether a public employee waives the right to challenge a pre-termination hearing on due

process grounds when he attends the hearing only to object to its procedures.

II.

In reviewing a grant of summary judgment, we review the district court's determination *de novo*. *New Burnham Prairie Homes, Inc. v. Vill. of Burnham*, 910 F.2d 1474, 1477 (7th Cir. 1990).

A.

We agree with the district court's determination that the Board members' decision to terminate Baird was not tainted with bias. While the conduct of certain Board members appears to have been petty and maladroit, this seems to have been more a matter of modus operandi and style than of substantial prejudice. We are not persuaded, however, that the Board's procedures were entirely fair. The truncated pre-termination hearing afforded to Baird could comport with due process only if he received full due process promptly after termination. The error here was in determining under what circumstances a breach of contract suit can afford due process.

There can be no due process without "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552, 85 S. Ct. 1187, 14 L. Ed. 2d 62 (1965)). A hearing "appropriate to the nature of the case" must precede the "deprivation of life, liberty or property." *Loudermill*, 470 U.S. at 541 (internal citations omitted). A court considering what process is due in a specific situation must weigh three factors: "first, the private interest that will be affected by the

official action; second, the risk of erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." *Mathews*, 424 U.S. at 335.

1.

The Supreme Court has long recognized that a public employee can have a constitutionally protected property interest in continued employment; such interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); *Colburn v. Tr. of Indiana Univ.*, 973 F.2d 581, 589 (7th Cir. 1992) ("Property interests exist when an employer's discretion is clearly limited so that the employee cannot be denied employment unless specific conditions are met."). Applying the *Mathews* test to determine that terminated school district employees were not entitled to full pre-termination hearings in *Loudermill*, the Supreme Court stated that a pre-termination hearing need only be "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." *Loudermill*, 470 U.S. at 546. The Court's holding, however, rested on the fact that the terminated employees were entitled to a post-termination hearing before the Ohio Personnel Board, and the Court cautioned that "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures." *Id.* at 546-47.

Our own Seventh Circuit precedent likewise establishes that, when there is an opportunity for a full post-termination hearing, due process does not require an employer to provide full "trial-type rights" such as the right to present or cross-examine witnesses at the pre-termination hearing. *Staples v. City of Milwaukee*, 142 F.3d 383, 387 (7th Cir. 1998). *See also Head v. Chicago Sch. Reform Bd. of Tr.*, 225 F.3d 794, 803 (7th Cir. 2000) (when full post-termination procedures are available, public employer must provide a public employee with a protected property interest with pre-termination notice, explanation of evidence and a chance to tell his side of the story).

The issue in the case before us is whether a post-termination lawsuit for breach of contract can remedy the full due process deficiency in the pre-termination proceedings. *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001), is the leading Supreme Court case addressing this question. With respect to *Lujan*, the question of when a judicial remedy like this provides adequate post-termination due process, as the district court found, is elusive. A fine line distinguishes factual scenarios in which a judicial remedy for breach of contract is adequate from those in which it is not. Not all injuries are equal, and not all parties can be made whole through a breach of contract action. The somewhat obscure quality that separates one from the other is important and yet eludes precise definition. The Supreme Court has referred to this mysterious element as a "present entitlement," and identifies cases involving this factor as ones in which "the claimant was denied a right by virtue of which he was presently entitled either to exercise ownership dominion over real or personal property, or to pursue a gainful occupation." *Lujan*, 532 U.S. at 196. *See also DeBoer v. Pennington*, 287 F.3d 748, 750 (9th Cir. 2002) (quoting *Lujan's* definition of "present entitlement")

and Canby, J., concurring (distinguishing *Perry v. Sindermann*, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972), which involved, like the present case, the due process protection of a personal property interest in employment).

A present entitlement is immediately distinguishable from the contractual interests dealt with in *Lujan* and its progeny. In *Lujan*, the state of California withheld funds from a public works subcontractor and imposed penalties after receiving notice that the subcontractor had violated provisions of the state Labor Code. The Supreme Court characterized the subcontractor's interest as merely a contractual interest, a "deprivation of payment that it contends it is owed under a contract" that could be adequately protected through a breach of contract suit. *Lujan*, 532 U.S. at 196. Moreover, the Supreme Court contrasted the subcontractor's interest with two illustrative examples of present entitlements in the employment context:

> In *Barchi* [*Barry v. Barchi*, 443 U.S. 55, 99 S. Ct. 2642, 61 L. Ed. 2d 365 (1979)] we held that a racetrack trainer suspended for 15 days on suspicion of horse drugging was entitled to a prompt post-deprivation administrative or judicial hearing. 443 U.S. at 63-64. And in *Mallen*, [*FDIC v. Mallen*, 486 U.S. 230 (1988)] we held that the president of a Federal Deposit Insurance Corporation (FDIC) insured bank suspended from office by the FDIC was accorded due process by a notice and hearing procedure which would render a decision within 90 days of the suspension. 486 U.S. at 241-243. See also *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349 (1969) (holding that due process requires notice and a hearing before wages may be garnished).

Id.[1] The postdeprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to re-store the claimant to possession. The underlying concept seems to be that the remedy is available before the loss has become complete and irrevocable.

A state law breach of contract action is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing. *Id.* While it does provide a species of due process, a lawsuit does not satisfy the requirement of promptness, which is essential if the employee is to pursue time-sensitive remedies such as rein-statement. While there is no specific time frame within which a hearing must be held to qualify as "prompt," lack of a speedy resolution to proceedings may result in a denial of due process. *Loudermill*, 470 U.S. at 547. *See also DeVito v. Chicago Park Dis.t*, 972 F.2d 851 (7th Cir. 1992) (holding that post-termination hearing must be "prompt" and that, under guidelines for determining promptness for post-suspension hearing enunciated in *FDIC v. Mallen*, 486 U.S. 230 (1988), a year's delay in holding a post-termination hearing did not deny terminated public employee due process). Similarly, while there is no automatic right to

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[1] Similarly, in applying *Lujan's* holding to the property interest of the former managers of a city-owned cemetery whose management contract was terminated by the city, the Ninth Circuit reasoned that because the "contract here has not given rise to greater interest than the contract itself," the deprivation was a mere contractual injury that could be adequately protected by a state breach of contract suit. *DeBoer*, 287 F.3d at 750.

reinstatement, it is "normally an integral part of the remedy for a constitutionally impermissible employment action." *Reeves v. Claiborne County Bd. of Educ.*, 828 F.2d 1096, 1101 (5th Cir. 1987).[2] *Cf. United Food & Commercial Workers Local 100A v. John Hofmeister & Son, Inc.*, 950 F.2d 1340 (7th Cir. 1991) ("Reinstatement and back pay awards are common remedies in wrongful discharge cases."). Further, as the Sixth Circuit has noted, "employment, especially in a career such as education, is more than a way to make money; it is a profession with significant non-monetary rewards," and consequently money damages may be a "hollow victory." *Banks v. Burkich*, 788 F.2d 1161, 1164 (6th Cir. 1986) (citing *Allen v. Autauga County Bd. of Educ.*, 685 F.2d 1302, 1306 (11th Cir. 1982)). Thus, when a public employee terminated for cause has a present entitlement, and when the only avail-able post-termination remedy is the opportunity to bring a state breach of contract suit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirements of notice and an opportunity to be heard.

2.

After reviewing the facts of this case, we conclude that Baird has established his present entitlement. Baird's interest is distinguishable from those in *Lujan* and its progeny; he was terminated in the first year of a three-year contract, and had

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[2] While *Reeves* involved a teacher challenging a reassignment on the grounds that it violated the First Amendment, the Fifth Circuit's treatment of reinstatement applies here as well.

a protected property interest in remaining in office under his contract for its full term and in being compensated accordingly.[3] *See Lujan*, 532 U.S. at 196. Baird's present entitlement also meant that he was entitled to pursue reinstatement promptly if his rights had been violated. Accordingly, the Board was obligated to provide a pre-termination hearing that fully complied with due process. This it failed to do.

The Board takes credit for "generous" pre-termination hearing procedures to a degree such that one might envision the proceedings as a veritable cornucopia of due process protections. In reality, however, the Board's gestures seem to have been just that--gestures. While Baird was ostensibly afforded the opportunity to call and question witnesses, the Board effectively emasculated this provision by refusing to furnish him with the names of district employees who had acted as undercover school board informants. Baird was also allowed to question Board members--but only about matters as to which they had spoken. What the Board gave to Baird with the left hand, it seemed to take away with the right, leaving Baird with a pre-termination hearing that may have satisfied a bare-bones *Loudermill* standard, but little else. [4]

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[3] Because we have held that a pecuniary loss is an actionable deprivation of property, we need not reach the issue whether the termination's adverse effect on Baird's future employment prospects is also an actionable deprivation. *Head*, 225 F.3d at 803 (citing *Swick v. City of Chicago*, 11 F.3d 85, 86-88 (7th Cir. 1993)).

[4] This finding is supported by an application of the factors enunciated in *Mathews*. The threat of loss of livelihood coupled with an opportunity to promptly pursue reinstatement are the primary private concerns of a public employee who stands to be terminated, although the impact of a 'for cause' termination on

And the Board has offered no reason why more generous measures under the *Mathews* criteria might have been difficult or impossible to supply.

We are aware that Baird presumably does not *now* as a practical matter pursue reinstatement as a remedy. However, this does not alter our analysis. The kind of remedies that conform to due process must be available promptly and must generally include the possibility of reinstatement. Otherwise they are not adequate to address the loss of a present entitlement.

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future employment prospects is serious as well. A public employee has a right to verify the accuracy of the purported cause(s) of termination. The opportunity to confront and cross-examine accusers, a cornerstone of our adversary system, assists in resolving disputes over facts giving rise to the termination or indeed over whether the termination itself is merited, and so is key to preventing the deprivation of a constitutionally protected property interest. While the right to confront and cross-examine witnesses is not absolute in the civil context under *Catlett v. Woodfin*, 13 Fed. Appx. 412 (7th Cir. 2001), such an opportunity must be afforded to terminated public employees with present entitlements, whose pre-termination hearings must fully comport with due process when no other procedural safeguards exist. Finally, it is expensive and time-consuming to hire and fire, and so the government also has an interest in verifying that the purported "cause" of termination is legitimate. It is more efficient to ensure that a pre-termination hearing comports with due process when an employee to be terminated "for cause" possesses a present entitlement than it is to defend a lawsuit.

3.

In reaching this conclusion, we find persuasive the reasoning of, *McClure v. Independent School District No. 16*, 228 F.3d 1205 (10th Cir. 2000), in which a principal terminated under a one-year contract was afforded only a minimal pre-termination hearing in which the district attorney presented live witnesses and sought to introduce accusatory affidavits from identified district employees. The Tenth Circuit found that the terminated principal was entitled to confront and cross-examine those individuals "whose work deprives a person of his livelihood." *McClure*, 228 F.3d at 1211. *McClure* underscores the importance of cross-examination here, for the opportunity for confrontation was even more fully denied here where Baird was deliberately prevented from ascertaining the identities of his accusers.

Moreover, Seventh Circuit precedent is to the same effect. We have never held that a state breach of contract action provides a terminated public employee with adequate due process *when that employee possessed a present entitlement*. The present case is immediately distinguishable from other cases cited by the Board. The Board's invocation of *Strasburger v. Board of Education, Hardin County Community Unit School District*, 143 F.3d 351 (7th Cir. 1998), is simply not persuasive since *Strasburger*, primarily concerned with substantive due process, essentially held that a terminated public employee challenging his termination on procedural due process grounds need only show that he had been deprived of a protected interest and that there had been a failure of due process. *Id.* at 358. Where a present entitlement is involved, a post-deprivation breach of contract suit cannot adequately remedy due process deficiencies.

The Board's reliance on *Schacht v. Wisconsin Department of Corrections*, 175 F.3d 497, 503 (7th Cir. 1999), and *Papapetropoulous v. Milwaukee Transport Services, Inc.*, 795 F.2d 591 (7th Cir. 1986), is similarly unavailing. *Schacht* is inapposite because in that case we held that a terminated prison guard possessed adequate due process remedies under Wisconsin law because he could pursue reinstatement, backpay, attorneys' fees and costs through the Wisconsin Personnel Commission. 175 F.3d at 503. *Papapetropoulous* involved a terminated bus driver who was held not to have been denied due process when a federal arbitrator cut short his cross-examination of an emotionally distraught witness in a federal pre-termination arbitration hearing convened under union guidelines. 795 F.2d at 598-600. We stated in the purest dicta that a plaintiff with a protected property interest who has an adequate state remedy is not deprived of due process, and noted that the driver could have brought a breach of contract action in state court against his employer. *Id.* at 601 n.14. *Papapetropoulous*, which clarified when a contract suit is adequate, predates *Lujan* by fifteen years and is distinguishable on several grounds: it reviewed an arbitrator's decision in a pre-termination hearing held pursuant to a union contract; Papapetropoulous did not challenge the adequacy of a state breach of contract action as a post-termination remedy and was afforded a hearing that provided due process; the language at issue was footnote dicta, quite unnecessary to our holding.

B.

Resolving the central issue whether Baird's pre-termination hearing provided adequate due process does not end our inquiry. We must also address an issue that is dear to the heart of every lawyer seeking to bolster more elaborate arguments: waiver. The Board not unpersuasively argues that

Baird waived the right to contest the adequacy of his pre-termination hearing on due process grounds when he failed to attend the hearing. In response, Baird contends that he did attend the hearing to object to its procedures, and, moreover, claims that he was not legally required to attend to preserve his right to object when he had received advance notice that the hearing would be merely a kangaroo court.

We have frequently held that terminated employees who do not avail themselves of pre-termination hearings waive their right to contest the adequacy of such hearings. *See Fern v. Thorp Pub. Sch.*, 532 F.2d 1120, 1131-32 (7th Cir. 1976) (holding schoolteacher to be terminated for cause waived his claim of procedural due process violation when he knew the time, place and purpose of the pre-termination hearing before the school board but chose not to attend after conferring with his counsel) (internal citations omitted). Baird's conduct seems to lie somewhere between the green of attendance and the red of nonattendance. Baird did not participate in the discussion of the merits held at the hearing, but he and his attorney had requested the Board to implement procedures comporting with due process; when the Board refused Baird's requests, he attended the hearing, but remained only to object to the procedures. It would be difficult to see this as a default that automatically waives further objection as a matter of law.

Although the issue may be close, we conclude that Baird did not waive his right to contest the adequacy of the hearing on due process grounds. The obvious deficiency of the procedures offered in the instant case, and the fact that Baird did appear to state his objection to these procedures, distinguishes it from *Fern* and similar cases. Seventh Circuit authority establishes only that the right to object to an arguably deficient hearing is waived when an employer offers a pre-termination hearing and a public employee facing

termination fails to accept the offer by failing to appear. *Ryan v. Illinois Dep't of Children & Family Servs.*, 185 F.3d 751, 761 (7th Cir. 1999). *See also Flynn v. Sandahl*, 58 F.3d 283, 288 (7th Cir. 1995) ("employee cannot claim lack of due process when his employer offered him such a pre-termination hearing and he refused to attend."); *Cliff v. Bd. of Sch. Comm'rs of City of Indianapolis*, 42 F.3d 403, 414 (7th Cir. 1994) ("the right to such a hearing is waived when an employer offers a pre-termination hearing and the employee fails to accept."). Here, Baird did not fail to accept the hearing but appeared and sought to obtain a fairer one; he did attend for the purpose of objecting to the truncated procedures. The Board apparently had no intention of relaxing its procedural strictures. And the hearing would still have missed full due process by a country mile: even if Baird had learned of the informants' identities at his hearing, it would have been too late to confront and cross-examine them. He would still have been forced to construct a blind defense. Ignorant of the identities of his accusers, Baird would likely have been terminated whether or not he chose to participate in the hearing after objecting to its procedures, and it is hard to see how he could mount a rational defense without more information about the charges. Offering such a toothless procedure may have met minimum *Loudermill* requirements *if there had been full post-termination due process*, but it is hard to see Baird's limited participation as a waiver as a matter of law.

Precedent establishes that, when a pre-termination hearing is offered, "the offeree should assume that it will be a fair hearing until the offeror indicates otherwise." *Fern*, 532 F.2d at 1133 (citing *Suckle v. Madison Gen. Hosp.*, 499 F.2d 1364, 1367 (7th Cir. 1974). Baird contends that he was not obligated to participate in the hearing because the presumption of fairness evaporated after the Board notified him of the

hearing procedures and denied his request for additional procedures. This argument may overstate the appropriate position. *Fern* and *Suckle* are silent as to the propriety of conduct after a presumption of a fair hearing is apparently belied by the offeror's conduct. We believe the *presumption* of fairness continues and the plaintiff bears the risk of waiver, but under the present facts, when the plaintiff has requested reasonable safeguards and has been flatly denied both before and at the hearing and where nothing useful could apparently be gained by continuing participation, we will not find a waiver as a matter of law.

C.

Having found that the Board is not entitled to summary judgement on the issue of violation of Baird's due process rights and that Baird did not waive, as a matter of law, his right to contest the adequacy of the hearing on due process grounds, we turn finally to the question, which was not addressed by the district court, whether the Board members qualify for absolute or qualified immunity. Absolute immunity attaches to "all actions taken in the sphere of legitimate legislative activity." *Bogan v. Scott-Harris*, 523 U.S. 44, 54, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1988). The Board contends that its individual members are absolutely immune from liability since various discrete actions in firing Baird--namely the determination of rules and procedures, participation in the pre-termination hearing and individual decisions to terminate Baird--were legislative acts. The issues raised by this appeal are, however, a totality involving the termination of an employee, which is an administrative act. The evidence does not establish that the Board members are entitled to legislative immunity.

Nor do Board members appear to be entitled to qualified immunity, which protects public officials who exercise discretionary or policymaking functions from liability in damages. *Billings v. Madison Metro. Sch. Dist.*, 259 F.3d 807, 815-16 (7th Cir. 2001). The district court did not reach this issue. However, public officials are entitled to qualified immunity if their actions violate "clearly established statutory or constitutional rights then known to a reasonable officer." *Id.* at 816. Under the two-step analysis enunciated by the Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), we first assess whether "the state actor's conduct violated a constitutional right when viewed in the light most favorable to the party asserting the injury." If such a violation exists, we must determine whether the right violated was clearly established. *Id.*

We have already found that the Board violated Baird's due process rights by according him a hearing whose procedures were severely deficient. Thus, we proceed directly to the question whether Baird's rights were clearly established. We conclude that they are. A right must be established at the "appropriate level of specificity before a court can determine if it was clearly established." *Wilson v. Layne*, 526 U.S. 603, 615, 119 S. Ct. 1692, 143 L. Ed. 2d 818 (1999). Our inquiry is defined by whether "it would be a clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 531 U.S. at 202. Qualified immunity thus affords public officials a certain leeway in their actions; "the concern of the immunity inquiry is to acknowledge that reasonable mistakes can be made as to the legal constraints on particular . . . conduct." *Id.* at 205. Reduced to its essential elements, if the public official's "mistake as to what the law requires is reasonable, the official is entitled to the immunity defense." *Id.*

Determining the reasonableness of a "mistake" does not necessitate comparison to a precedent that squares in every detail with the present case. *See Ulichny v. Merton Comm. Sch. Dist.*, 249 F.3d 686, 706 (7th Cir. 2001) ("It is not necessary for liability, however, that an identical factual situation had been legally decided adverse to the officer."). As earlier discussed, numerous cases from *Perry v. Sindermann* to *Loudermill* to *Lujan*--a case the defendants rely on to justify their conduct--have defined the contours of what process is due to a public employee who is to be terminated. Given the quality and volume of this precedent, we cannot determine on this record that the Board's conduct was a reasonable mistake, thereby establishing the defense of qualified immunity.

III.

It is always pleasant when the troublesome process of terminating an employee whose job performance is perceived as unsatisfactory can be concluded with a polite handshake and a heartfelt "fare-thee-well." Unfortunately, that ideal firing most often remains just that--an ideal. Here, not only did goodwill go by the boards but elementary fairness fell through the cracks. A lawsuit for breach of contract simply does not provide the due process which is missing elsewhere when a present entitlement is at stake.

For the above reasons we REVERSE and REMAND for further proceedings consistent with this opinion.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, WESTERN DIVISION

Case No. 01 C 50228

[Filed: September 4, 2003]

Kelly Baird	)
	)
v.	)
	)
Board of Education for Warren Community Unit School District No. 205, et al.	)
	)

Philip G. Reinhard, Judge.

MEMORANDUM OPINION AND ORDER

Plaintiff, Kelly Baird, filed a two-count complaint in state court against defendants, Board of Education for Warren Community Unit School District No. 205 ("Board") and its individual members ("individual defendants"). The complaint alleges breach of contract in count I and a claim under 42 U.S.C. § 1983 for deprivation of procedural due process in count II. Defendants properly removed the action to this court based on federal question jurisdiction over the § 1983 claim. 28 U.S.C. §§ 1331, 1441(a). The court has supplemental

jurisdiction over the breach of contract claim pursuant to 28 U.S.C. § 1367. Plaintiff moves for partial summary judgment as to liability on the prong of his section 1983 claim which claims the procedures provided prior to his termination were inadequate. Defendants also move for summary judgment and to strike plaintiff's response to defendant's motion for summary judgment.

Plaintiff was hired by the Board under a 3-year contract to serve as superintendent/principal. The Board terminated plaintiff's employment under the "for cause" provision of the contract after only one year. The contract provided that discharge "for cause shall be for any conduct, act, or failure to act by the Superintendent which is detrimental to the best interests of the School District. Reasons for discharge for cause shall be given in writing to the Superintendent, who shall be entitled to notice and a hearing before the Board to discuss such causes." Plaintiff asserts the Board failed to provide him with a termination hearing that met constitutional procedural due process standards. On April 18, 2001, The Board sent plaintiff a letter notifying him of its intent to terminate him for cause, advising him of a May 16, 2001, hearing on the termination, that the causes for termination were set forth in his evaluation which was included with the letter and that he could be represented at the hearing. Plaintiff's counsel responded to this letter with a letter requesting information concerning charges in the evaluation and requesting a continuance of the termination hearing. The Board responded through its counsel by letter dated May 9, 2001, which indicated it was denying most of plaintiff's requests. The letter also stated that plaintiff could call witnesses but that the Board did not have subpoena power to compel witness attendance, that the Board would not call witnesses, that a single board member would present the case for termination, that other board members would speak to

certain issues and that questions by plaintiff would be limited to being directed to the board member presenting the case and to other board members only as to matters to which the board member had spoken. Plaintiff's counsel responded that the Board's failure to produce any witnesses rendered it impossible to cross-examine them and the failure to produce the names of individuals who provided the factual basis for the evaluation made it impossible for plaintiff to call them as witnesses. Plaintiff's counsel stated the inability to cross-examine his accusers made it impossible for plaintiff to defend himself against the accusations, that the procedures provided could not produce a fair hearing, and that plaintiff would not participate in the hearing beyond appearing to object to the procedures. The scenario described in the correspondence played itself out and plaintiff was terminated.

Defendants maintain the procedures followed met the constitutional standards for procedural due process for a pre-termination hearing because they provided plaintiff notice and an opportunity to be heard with a right to sue for breach of contract providing an adequate post-termination remedy. Plaintiff argues that because the pre-termination hearing was the only hearing, it had to provide the right to cross-examine his accusers in order to satisfy minimal procedural due process requirements and that the constitutional requirements are not met by the availability of a post-termination breach of contract action. To meet procedural due process requirements, a pre-termination hearing must provide notice of the charge, an explanation of the basis of the charge and an opportunity to respond. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985). Plaintiff was given notice of the hearing and his evaluation which set out the perceived deficiencies in his performance. The hearing procedures allowed him to respond to these charges by presenting witnesses and his own

evidence. This procedure was sufficient for a pre-termination hearing. *See id.*

Plaintiff contends the pre-termination hearing was insufficient because it was the only hearing and did not allow him the opportunity to confront his accusers in a meaningful way. However, the hearing that was offered, coupled with the right to bring a state law breach of contract claim, provided plaintiff with due process. Plaintiff had a property interest in his employment contract. His contract was for a three-year term and could only be terminated early for cause. The pre-termination hearing offered him the chance to tell his side of the story prior to termination. The right to bring a breach of contract suit provides him with the opportunity to challenge the existence of cause through full judicial proceedings, including discovery to identify his accusers, the ability to confront and cross-examine them at trial, and the opportunity to be made whole through damages for breach. While plaintiff suggests his allegedly wrongful termination after the first year of the contract effectively deprived him of the ability to obtain employment as a superintendent elsewhere, he has not presented evidence the Board's action stigmatized him so that he suffered a tangible loss of employment opportunities so as to deny him a liberty interest without due process. *See Strasburger v. Board of Educ., Hardin County*, 143 F.3d 351, 356 (7th Cir. 1998), *cert. denied*, 525 U.S. 1069, 119 S. Ct. 800, 142 L. Ed. 2d 661 (1999). The contract created his property interest in employment and the interest of which he was deprived was limited to his rights under the contract for the remaining two years. In *Matthews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), the Supreme Court set forth three factors to consider in determining whether due process was provided: (1) the private interest being affected by the government action, (2) the risk of an erroneous deprivation of that interest and the

probable value of additional or substitute safeguards, and (3) the government's interest. It is plaintiff's contract rights, the two remaining years of the contract term, which are the private interest affected by government action. The Board's interest is having an effective school superintendent/principal. Both of these are important interests. Looking at the remaining *Matthews* factor, the risk of erroneous deprivation, the pre-termination hearing provided plaintiff the chance to tell his story and a post-deprivation breach of contract suit allows plaintiff's contract rights to be vindicated, if wrongfully deprived, by allowing plaintiff to recover damages for breach. These procedures provided adequate safeguards against erroneous deprivation of plaintiff's property interest in the remainder of his contract.

Plaintiff also argues he was denied due process because the decisionmaker was not impartial. A person who has prejudged the matter cannot sit in judgment on a termination but partiality will not be presumed just because the Board both investigated and adjudicated the termination decision and it is presumed individuals making decisions affecting the public are acting in the public interest. *See Bakalis v. Golembeski*, 35 F.3d 318, 325-26 (7th Cir. 1994). Taking the evidence most favorably to plaintiff, it cannot be concluded that the individual defendants prejudged the case. The record reflects that various board members were contacted by district employees raising concerns about certain of plaintiff's actions and that some board members had concerns of their own from their personal experience. Some of these concerns were memorialized in memoranda written by some of the board members. However, these concerns were within the scope of matters board members would be expected to consider and their expressions of disapproval of plaintiff's handling of various matters is within the scope of their duties. The mere fact some of them may have been unhappy with plaintiff's

performance does not overcome the presumption they were acting impartially at the time of the discharge hearing.

For the foregoing reasons, plaintiff's motion for partial summary judgment as to liability on procedural due process grounds is denied. Defendant's motion for summary judgment is granted as to the procedural due process claims. Defendant's motion to strike is denied. Because this order disposes of all federal claims, the court declines to exercise supplemental jurisdiction over the state law breach of contract claim, which is remanded to state court. *See Payne v. Churchich*, 161 F.3d 1030, 1043 (7th Cir. 1998), *cert. denied*, 527 U.S. 1004, 119 S. Ct. 2339, 144 L. Ed. 2d 236 (1999). The balance of this case is dismissed with prejudice.

JUDGMENT IN A CIVIL CASE

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that plaintiff's motion for partial summary judgment as to liability on procedural due process grounds is denied. Defendant's motion for summary judgment is granted as to the procedural due process claims. Defendant's motion to strike is denied. The court declines to exercise supplemental jurisdiction over the state law breach of contract claim, which is remanded to state court. The balance of this case is dismissed with prejudice.

All orders in this case are now final and appealable.

Date: 9/4/2003

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Case No. 01 C 50228

[Filed: March 18, 2002]

BAIRD	)
	)
vs.	)
	)
BOARD OF EDUCATION	)
	)

OPINION BY: Philip G. Reinhard

MEMORANDUM OPINION AND ORDER

Plaintiff, Kelly Baird, filed a two-count complaint in state court against defendants, Board of Education for Warren Community Unit School District No. 205 ("Board") and its individual members ("individual defendants"). The complaint alleges breach of contract in count I and a claim under 42 U.S.C. § 1983 for deprivation of procedural due process in count II. Defendants properly removed the action to this court based on federal question jurisdiction over the § 1983 claim. 28 U.S.C. § 1441(a) The court has supplemental jurisdiction over the breach of contract claim pursuant to 28 U.S.C. § 1367. Defendants have moved to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).

Plaintiff was hired by the Board under a 3-year contract to serve as superintendent/principal. The Board terminated plaintiff's employment under the "for cause" provision of the contract after only one year. Plaintiff's complaint asserts the Board lacked cause to terminate him and failed to provide him with a termination hearing that met constitutional due process standards.

A 12(b)(6) motion is granted only if no set of facts consistent with plaintiff's complaint could be presented which would entitle him to judgment. *See Hedrich v. Bd of Regents of Univ. of Wisc. Sys.*, 274 F.3d 1174 (7th Cir. 2001) Defendants contend the facts pled in the complaint establish plaintiff could not prove a claim under either count of the complaint. They assert the alleged facts demonstrate cause for termination, that the availability to plaintiff of a breach of contract action obviates the need for any hearing, and that the hearing provided met due process requirements if a hearing was actually required. They also argue the individual defendants are protected from this suit by absolute and qualified immunity.[1]

Defendant contends *Lujan v. G & G Fire Sprinklers, Inc.*, 532 U.S. 189, 121 S. Ct. 1446, 149 L. Ed. 2d 391 (2001) requires dismissal of the § 1983 claim because plaintiff's ability to bring a breach of contract claim for his termination provides all the process that is due. In *Lujan*, the court held the availability of a breach of contract action under state law

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[1] While the complaint does not specify the individual defendants are being sued in their individual capacity, plaintiff asserts that they are (Pl. Memo. p. 14) and the allegations of the complaint and the request for punitive damages support reading the complaint as an individual capacity suit. *See Wynn v. Southward*, 251 F.3d 588, 592 (7th Cir. 2001)

provided constitutional due process to a party who was deprived of payment by the state under a contract where the state maintained the party failed to comply with the contract terms and the party claimed it had complied. *Id.*, at 196-97. *Lujan*, however, distinguished its facts from cases where plaintiff was presently entitled to pursue gainful employment. *Id.*, at 196. In doing so, *Lujan* does not appear to imply that a right to bring a post-termination suit for breach of contract can replace the previously recognized right to a hearing on the issue of cause, where a public employee with a contractual right to be discharged only "for cause" is terminated, see *Lalvani v. Cook County*, 269 F.3d 785, 794 (7th Cir. 2001), as the standard for procedural due process.

Inherent in the right to a hearing is the right to a hearing by an impartial tribunal. *See Bakalis v. Golembeski*, 35 F.3d 318, 323 (7th Cir. 1994). Plaintiff has alleged he properly performed the contract and that there was no cause for his termination. (Compl. ¶ 15) He has alleged that certain members of the Board were biased toward him and did not act as impartial decision makers concerning his employment. (*Id.*, ¶¶ 16,19) He has alleged the Board predetermined his termination (*Id.*, ¶ 27) and based its decision to terminate him solely on the animus and ill-will of the individual defendants. (*Id.*, ¶ 34 F). If he were to present facts proving these allegations, plaintiff would sustain a claim for breach of contract, and for due process violations against the defendants, from which the individual defendants would not be shielded by qualified immunity, *see Bakalis*, 35 F.3d at 326-27 nor do the allegations implicate only the types of actions by the individual defendants that would necessarily be protected by absolute immunity. *See Bogan v. Scott-Harris*, 523 U.S. 44, 56, 118 S. Ct. 966, 140 L. Ed. 2d 79 (1998). Plaintiff's complaint is sufficient to withstand a 12(b)(6) motion. Whether the hearing was adequate, the tribunal

impartial, the contract breached, or the individual defendants immune must await another day.

Defendants' motion to dismiss is hereby denied.

APPENDIX E

WARREN COMMUNITY UNIT DISTRICT #205
SUPERINTENDENT/PRINCIPAL EVALUATION
APRIL 18,2001
Dr. Kelly D. Baird

A rating is given for each category in which you were evaluated. The rating scale is from low to high, 1 being the lowest and 5 being the highest. Commentary to support the ratings is included below each category. Although some issues fall into more that one category, so as not to be repetitive, they may be noted in only one category.

1. Has sufficient enthusiasm. Rating: 4

Although the Board gave a rating of 4 in this area, further explanation is warranted. You have an enthusiastic tone when speaking which causes some of the Board members to give you a high rating in this area. However, the enthusiastic tone is misleading inasmuch as it is often inconsistent with your actions. You show little, if any signs of enthusiasm toward you job as Superintendent of the District and Principal of the elementary and middle schools. This rating reflects differing opinions of Board members as to whether it should reflect only vocalizes enthusiasm or follow-through as well.

For example, for the first time since the beginning of the school year, you, in November, pursued an opportunity to chaperone the 5th and 6th grade students on their Chicago field trip. The Board was pleased that you were showing signs of wanting to spend time with some of the students and, as their

Principal, get to know them better. Rather than ride the bus to Chicago with the students, spend time with them in Chicago and act as a chaperone, you drove separately, met the group for a very short time at the museum and left to spend the day with your companion.

2. Has satisfactory oral communicating ability. Rating: 3

The Board was split between 1 and 5 in this category resulting in an average of 3, again due to differing opinions as to what conduct the rating should reflect.

While you speak well in a one-on-one conversation, you often do not listen or listen to only part of what is being communicated.

An example would be when the Board President and Vice President told you that they were concerned with teacher morale. You took that concern and told another Board member that any question of morale was solely related to insurance issues.

3. Has satisfactory written communicating ability. Rating: 3

While some Board members felt your written communication was effective, others felt it was careless. On several occasions your written communications have had to be retracted because you failed to make sure your information was correct, for example changing meetings because you had failed to check for potential conflicts in the school calender.

4. Has satisfactory personal appearance. Rating: 4

You always appear well groomed.

5. Has proper degree of self-confidence. Rating: 3

There is a degree of self-confidence that is viewed as arrogance. Again this rating is reflective of the way the question is stated - some Board members rated this question a 5 because of your extreme self-confidence while others rated it a 1 considering that it is not a proper degree of self confidence you exhibit.

6. Uses sound judgment. Rating: 2

You have exercised poor judgment in most aspects of your job. The examples are too numerous to include here.

Key examples are: a) your failure to seek input in appropriate settings from teachers, other administrators and Board members in working on plans for the buildings and other issues leading to the referendum; b) encouraging teachers to spend in excess of their needs; c) encouraging teachers and planning for yourself to "play hooky" at school-related seminars; and d) buying office furniture without the Board's approval.

7. Has philosophy of education compatible with that of the community. Rating: 2

You have not taken enough interest in the community to even know what our educational philosophy might be. You simply allude to the State of Illinois 1997 Learning Standards.

Your philosophy of student discipline seems to be inapposite to that of the faculty. There are numerous examples that the teachers have related to various Board members describing your failure to seriously deal with discipline problems they have sent to you. The teachers have,

by and large, decided to handle discipline matters themselves. Your failure in this area is demoralizing to the students and staff and detrimental to the educational environment.

8. Has satisfactory relationship with staff. Rating: 1

The Board has been advised that you spend a minimal amount of time with the staff. The meetings that you do have are not substantive. There have been times you have had the teachers organize school improvement days by themselves. The teachers have decided to do things on their own because they cannot count on you for leadership or direction.

You have failed to establish clear lines of communication with staff regarding school goals, accomplishments, practices and policies as required by law. Further, your actions and inaction with respect to communication with staff have led to demoralization of staff and general breakdown in appropriate communication hierarchy and problem resolution procedures.

9. Has satisfactory relationship with the board. Rating: 2

You have shown no respect for the Board of Education. You have told people that you intend to irritate the board and you wish to "break the district". This is an unacceptable attitude that undermines the Board's goals and efforts and impedes the general progress of the District.

10. Uses ability to delegate sufficiently. Rating: 1

In order to delegate, one must take an interest in and responsibility over matters. You do not. You simply relinquish your responsibility and tell the teachers that they are in charge.

11. Has satisfactory concern for detail. Rating: 1

You show little concern for detail and rarely show concern for the big picture. When you do take an interest in details, it is often inefficient. For example, suggesting that attorneys, architects and engineers be present at Board meetings when their input could easily be handled more efficiently by telephone or fax. Also, you often fail to give a principal's report even when one is warranted - for example, in October, you should have reported the testing of the students that was taking place, the school pictures that were being taken and the Halloween events that were being scheduled.

12. Has satisfactory decision making ability. Rating: 2

You make decisions without first seeking the appropriate information.

13. Leadership ability is satisfactory. Rating: 1

Your lack of presence in the District makes it impossible for you to exercise appropriate leadership skills. You have not been in the District for a full seven-day week. You routinely arrive late on Monday and leave early on Fridays. You whereabouts are often unknown to the staff making it impossible to contact you in the case of an emergency.

You have never been present for school improvement days or for the parent-teacher conferences in November. You have told individual teachers to be in charge of school improvement days and do what they want. Some of the teachers feel that the aides are allowed to do whatever they want to do.

This conduct constitutes an abdication of your responsibilities under your employment contract and Illinois law. The Board finds that your lack of presence and direction to staff results in a failure in leadership and an inability to maintain a positive education and learning climate.

14. Has satisfactory ability to shoulder responsibility. Rating: 1

You have taken little, if any, responsibility for school related matters since your arrival.

15. Follows policy satisfactorily. Rating: 2

You have not been sufficiently present to follow much policy. When you have had occasion to intervene in disciplinary policy, you seem to encourage the misbehaviors and minimize the offense.

16. Has satisfactory community image. Rating: 1

You neither live in the community (we do not consider staying at a bed & breakfast establishing a residence) nor do you spend any recreational or social time in the community. You have failed to become involved in any community activities. Your image of the community and the community's image of you is one of shared disdain. A superintendent/Principal's relationship with the community should guide his policy and curriculum goals and generally be reflected in a vision for the District. You have failed to accomplish this fundamental aspect of your duties.

17. Is dependable. Rating: 1

It is impossible to depend upon you. Your whereabouts are often unknown. We can never be sure that the information that you disseminate is accurate. You tell us that you have spoken to people or been to meetings and we later discover that the people you were to meet with say you did not attend the meeting or the person that you called had not spoken to you.

18. Is too sensitive - takes things too personally. Rating: 1

The Board believes that your reaction to our involvement in school matters if inappropriately defensive. Examples include: a) the October meeting wherein Annelisa questioned the frequency and content of staff meetings at Apple River Middle School - you immediately became defensive and asked her if she had information to prove that you did not have staff meetings and tried to intimidate Annelisa from questioning him further; b) the March meeting wherein you reported that a preschool mother had called and indicated that she had spoken to Board members regarding the rehiring of the preschool teacher despite prior complaints about her teaching. You reacted by saying that you questioned why we even bothered having an administration staff.

19. Has right amount of persistence. Rating: 2

You rarely follow up on requests for further information.

20. Is adaptable when required. Rating: 2

You give the impression that your way is the only way in most instances. You appear to have no desire to adapt to the District's interests or goals.

21. Has sufficient aggressiveness. Rating: 3

As with item 5, some members of the Board believe that your degree of aggressiveness should reflect a high rating in this category while other members believe that your aggressiveness is excessive. The difference in interpreting the application of the rating resulted in scores of 5 and 1 averaging three.

22. Has pronounced interest in improving the instructional program. Rating: 3

You are required by your employment contract and Illinois law to have as a primary goal the improvement of instruction in the District. The only interest you have shown is the concept of aligning the District's curriculum to the 1997 State of Illinois Learning Standards - and improvement that was already underway prior to your arrival.

23. Generally open-minded. Rating: 2

We do not believe that you are satisfied or happy unless things are done your way.

24. Has ability to organize well. Rating: 3

You are adequate at organizing your materials. It is noted, however, that destroying all of you predecessor's files was not a productive educational effort.

25. Plans ahead sufficiently. Rating: 2

As noted earlier, you often fail to review the school calendar to avoid conflicts prior to scheduling meetings.

26. Satisfactory ability to conflict. Rating: 1

You either blame others or become defensive when faced with conflict.

27. Satisfactory ability to live with pressure. Rating: 3

The Board does not believe that you have " lived" with pressure in your capacity as Superintendent/Principal. You are not available when pressure situations arise, or you simply tell the staff to deal with matters as they wish.

28. Has satisfactory amount of courage. Rating: 3

The Board has not seen you in any situation that required you to exercise courage.

29. Is very honest. Rating: 1

The Board believes that you have not been honest from the start. At the time we interviewed you, you seemed to share our interest in your spending time in our communities, having your family happily residing in our community, and developing a good relationship with our students. Your family never intended to move here - nor have you established a home here. You have made no attempt to be a part of our community.

There have been many instances where you have indicated that you went somewhere, spoke to someone, or met with someone and we have later discovered that you did not go where you said you were going, speak to whom you said you were speaking or meet with the whom you said you were meeting.

30. Has sufficient interest in public relations. Rating: 2

Based upon your lack of presence in and interaction with our communities, you seem to be completely disinterested in the public relations of this District.

31. Has satisfactory participation in local, state and national programs. Rating: 2

You have participated in nothing local. Other programs and seminars you have been scheduled to attend you have either wholly or partially failed to attend.

32. Has good interest and concern for employee morale. Rating: 1

You have made little, if any, effort to even get to know the employees, and this, clearly show no interest or concern for employee morale. We have reports that employees have shared concerns with you and that you have not followed up on their concerns even though you indicated that you would.

33. Is sensitive to the problems of others. Rating: 2

You are not in the District enough to obtain the opportunity to express sensitivity to the problems of others in the District.

34. Has satisfactory willingness to compromise. Rating: 2

You have neither made compromises nor shown a willingness to do so.

35. Is well informed. Rating: 2

It is difficult to be well informed about our District when you spend so little time in it.

36. Has satisfactory ability to evaluate. Rating: 3

Since the time the Board individually completed this rating, two incidents have come to light that would likely lower this rating:

First, the accelerated reader program staff requested additional help when first graders became involved in the program. You appropriately told the Board of her concern and indicated that you would monitor the program to see if additional help was warranted for the first graders. You reported to the Board that you had monitored the program and the additional assistance was unwarranted. Later, Annelisa Cleary served as a substitute in the program for two days. While Annelisa met with the aide responsible for the program to prepare for her two days of substitution, the aide indicated that you had never observed the program. When questioned about this, you indicated that you had been in education long enough to monitor a program simply by walking by the classroom door. However, Mrs. Cleary believes that the aid's concern with the first graders was, in fact, warranted.

Second, you recommended that the board re-hire a non-tenured staff member without ever being her classrom for the purpose of evaluating her performance. In fact, you did not know that she was non-tenured until a Board member pointed it out.

37. Uses tact. Rating: 2

You addressed a group of concerned citizens who were invited to become part of the referendum steering committee. As part of your conversation, you indicated that you were soliciting other "younger" people to become part of the steering committee intimating that the people present were "old". At the time, you had no idea about whom or to whom you were speaking.

38. What suggestions do you have for me to improve as Superintendent of the District?

You have generally demonstrated unsatisfactory performance of your duties as Superintendent/Principal. You have failed to relate to the students with appropriate authority, failed to respond, communicate or lead the staff, and failed to demonstrate appropriate respect and communication with the Board and the communities. You have not provided necessary focus or guidance to the District, and you lack of presence and accessibility has resulted in a general lack of confidence in your leadership.

Based on your performance to date, the Board does not believe that you have the ability to make necessary improvements in order to become an adequate Superintendent/Principal in the District.

38. What suggestions do you have for me to improve as Superintendent of the District?

Move to the district full time (as is required in your contract) and focus on becoming part of the community. Become involved in community activities and get to know people outside the school district. This was discussed during

your interviews and you promised that you would join some organizations and attend activities.

Spend adequate time on elementary principal duties and get to know you staff. Teacher morale is extremely low and it may be difficult to rebuild. Some teachers feel that you don't even know who they are because they rarely see you or never talk to you.

Get to know your students and involve yourself with them. Take interest in their activities and attend games, concerts, plays and contests. Staying in the community on the weekends would help a great deal. Students should know who you are and many of them don't unless they've been sent to your office. You should be visible to them; we know many of the junior/senior high school students don't even recognize you.

Utilize the resources you have in the district. When plans were drawn for the building, Mr. Nielsen and the board could have given much input for the architects, but weren't asked until plans were already made. You need to have a good working relationship with your principal which means he need to be included in discussions that affect him, his building and his students. In a small district you need to interact a lot with your staff. With the board some problems could have been alleviated if you had discussed some issues with us before acting on them (e.g., the furniture). We won't always agree on things, but they should be worked out without getting defensive or hearing negative comments at a later date.

While organizing the referendum required extra time, we feel that the district has suffered in other respects. There needs to be a strong leadership image and a high level of trust between personnel and the superintendent as well as between

the board and the superintendent. We don't feel that this has been a "good fit" between you and our district.

APPENDIX F

SUPERINTENDENT/PRINCIPAL'S EMPLOYMENT CONTRACT

Agreement between the Board of Education of Warren Community Unit School District No. 205, Jo Daviess County, Illinois, hereinafter referred to as the "Board," and, Kelly D. Baird, hereinafter referred to as the "Superintendent/Principal."

A. EMPLOYMENT AND COMPENSATION

1. The Board hereby employs the Superintendent/Principal for three (3) years, commencing on July 24, 2000, and terminating on June 30, 2003. The Superintendent/Principal's salary for the Contract year July 24, 2000 through June 30, 2001, shall be based on an annual salary of Seventy-One Thousand Dollars ($71,000.00), but shall be prorated to the amount of Sixty Six Thousand Nine Hundred Dollars ($66,900.00). This prorated salary is based on a 245 day work year during the first year of the Contract, rather than the 260 day work year which will be applicable in subsequent contract years. Such salary shall be payable in equal installments in accordance with the rules of the Board governing payments of other administrative staff members in the District. The Superintendent/Principal hereby accepts employment upon the terms and conditions hereinafter set forth.

2. The annual salary state in paragraph A.1 of this contract, may be adjusted in subsequent years of employment

under this contract by mutual agreement of the parties, but in no event will such future annual salary be less than that in the first year of this contract. Any such adjustment in salary shall be stated in an amendment to this contract, signed by the parties, and attached hereto and incorporated herein.

3. In addition to the annual salary stated in paragraph A.1 of this contract, the Board shall pay on behalf of the Superintendent/Principal to the State of Illinois Teachers' Retirement System and the Teachers' Health Insurance Security Fund the Superintendent/Principal's required contributions to said pension system and health fund. The Superintendent/Principal shall not have any right or claim to said amounts, except as they may become available at the time of retirement or resignation from the State of Illinois Teachers' Retirement System and the Teachers' Health Insurance Security Fund. Both parties acknowledge that the Superintendent/Principal did not have the option of choosing to receive the contributed amounts directly, instead of having such contributions paid by the Board to the Teachers' Retirement System and Teachers' Health Insurance Security Fund, and further acknowledge that such contributions are made as a condition of employment to secure the Superintendent/Principal's future services, knowledge and experience.

4. Any salary or other adjustment or modification made during the life of this contract shall be in the form of a written amendment and shall become a part of this contract, but such adjustment or modification shall not be construed as a new contract with the Superintendent/Principal, nor as an extension of the termination date of this contract.

5. During the term of this contract, the Superintendent/Principal shall hold a valid and properly

registered certificated issued by the State of Illinois Teachers' Certification Board qualifying him to act as Superintendent of the School District and as Principal in the School District.

6. The Superintendent/Principal represents that he is not under contract with any other school district for any portion of the term covered by this Contract.

7. As a required condition of employment for new employees, and prior to commencing duties under this Contract, the Superintendent/Principal shall submit to a physical examination by a physician licensed in Illinois to practice medicine and surgery in all its branches, and shall provide the Board with the physician's report of such examination pursuant to paragraph 24-5 of the *School Code*. The Superintendent/Principal shall further submit, at Board expense, to a physical or mental examination by a physician licensed in Illinois to practice medicine and surgery in all its branches whenever the Board deems such examination necessary and in accordance with applicable law. As a condition of employment, the Superintendent/Principal also agrees to comply with all health requirements established by law.

8. The Superintendent/Principal acknowledges that, pursuant to the *School Code*, he waives any right to tenure in the School District for the duration of this multi-year contract and any multi-year extension thereof.

9. As a required condition of employment for new employees, the Superintendent/Principal shall authorize a criminal background investigation by the Board, pursuant to the *School Code*, and DCFS Child Abuse Registry background investigation.

10. The Superintendent/Principal shall establish his residency within the School District by January 24, 2001, and shall remain a resident during the term of this contract as a condition of his employment as Superintendent/Principal.

B. BENEFITS

1. The Board shall reimburse the Superintendent/Principal for reasonable monthly expenses incurred in the performance of his duties as approved by the Board. Itemization shall be made by the Superintendent/Principal of all expenses incurred in accordance with the *Internal Revenue Code* as amended.

2. The Board will provide the Superintendent/Principal with the following benefits:

a. Full-family hospitalization/medical insurance, as provided under any program effective in the District;

b. Reimbursement for reasonable District related travel expenses (mileage), not including travel to and from the District and home, not to exceed $600 annually. Substantiation of all expenses incurred pursuant to this provision shall be made by the Superintendent/Principal in accordance with the regulations of the *Internal Revenue Code* as amended.

c. Membership dues for one professional organization subject to prior Board approval.

3. The Superintendent/Principal shall be entitled to a paid vacation of twenty (20) working days in each contract year, provided, however, that any vacation time in excess of five

(5) school days shall be mutually agreed upon by the Board and the Superintendent/Principal. Vacation must be taken within the twelve-month period, provided, however vacation days may be carried over with approval of the Board. The Superintendent/Principal shall also be entitled to all legal state or District - designated holidays. Such holidays shall include the Friday after Thanksgiving, three (3) days during Winter Break and two (2) days during Spring Break. The remaining days of Winder and Spring recess periods, and all of Summer recess periods shall constitute working days unless specifically scheduled and credited toward vacation days listed above.

4. The Superintendent/Principal shall be granted sick leave, as defined in Section 24-6 of the *School Code*, of twelve (12) working days per year, which may be accumulated to a maximum of 180 days.

5. The Superintendent/Principal is expected to attend appropriate professional meetings at the local and state levels and, subject to prior written Board approval, at the national level. All reasonable expenses incurred shall be reimbursed by the Board.

C. POWERS AND DUTIES

1. In his capacity as Superintendent, the Superintendent/Principal shall have charge of the administration of the schools under the direction of the Board; he shall be the chief executive officer for the Board; he shall recommend the selection, retention and dismissal of, and direct and assign, teachers and other employees of the School District under his supervision; he shall organize and direct the administrative and supervisory staff; he shall make recommendations to the Board concerning the budget, building plans, location of sites, and the selection of

textbooks, instructional material, and courses of study; he shall direct the keeping of all records and accounts, and aid in the making of all reports, as required by the Board; he shall recommend rules, regulations, and procedures deemed necessary for the welfare fo the School District; and, in general, he shall perform all other duties incident to the office of the Superintendent/Principal as the Board may delegate to him or as required by law.

2. In his capacity as Superintendent, the Superintendent/Principal shall devote his entire time, attention, and energy to the business of the School District and related professional activities. With the permission of the Board, the Superintendent/Principal may attend university courses, seminars, or other professional growth activities; serve as a consultant to another district or educational agency for a short-term duration without loss of salary; lecture and engage in writing activities and speaking engagements. The Superintendent/Principal may not jeopardize the functioning of the School District by any lengthy and conspicuous absence for such professional activities.

3. In his capacity as Principal, the Superintendent/Principal shall supervise the operation of attendance centers as the Board shall determine necessary and shall have as his primary responsibility the improvement of instruction. The Superintendent/Principal also shall assume administrative responsibilities and instructional leadership, under the supervision and direction of the Board and in accordance with the laws of the State of Illinois and the policies, rules and regulations of the Board, for the planning, operation and evaluation of the educational program of his assigned attendance area.

4. In his capacity as Principal, the Superintendent/Principal shall submit recommendations, as requested, to the Board concerning the appointment, retention, promotion and assignment of all personnel assigned to his attendance centers and shall keep such other registers, records and reports as may be directed by the Board or required by law.

5. In his capacity as Principal, the Superintendent/Principal shall, in accordance with the requirements fo Section 10-22.6 of the *School Code* and Board policy, suspend from school and from the school bus any students at his assigned attendance area who are found to be guilty of gross disobedience or misconduct.

D. REAPPOINTMENT

1. Notice of intent not to renew this contract shall be given to the Superintendent/Principal by the Board by March 1 of the year in which the contract expires. Said notice shall be in writing and state the specific reason for non-renewal. Failure to provide timely notice of non-renewal shall automatically renew this contract for one (1) additional year. The Superintendent/Principal shall notify the President and Secretary of the Board by February 1 of the year in which the contract expires that failure of the Board to give the Superintendent/Principal said notice of intent not to renew shall extend this contract for one (1) additional year. The failure of the Superintendent/Principal to give the required reminder notice to the Board shall waive the obligation of the Board hereunder to give its notice of intent by March 1. Within ten (10) days after receipt of a notice of intent not to renew this contract, the Superintendent/Principal may request a closed session hearing on the dismissal.

2. At the end of any year of this contract, the Board and Superintendent/Principal may mutually agree to extend the employment of the Superintendent/Principal for a multi-year period only if the Board finds that the Superintendent/Principal has met or exceeded the goal and indicators of student performance and academic improvement set forth in Section D.3 of this Contract.

3. The goals and indicators of student performance and academic improvement used by the Board to measure the performance and effectiveness of the Superintendent/Principal shall be determined by the following procedure:

a. Annually, the Superintendent, with the assistance of his administrative team, shall (1) evaluate student performance, using criteria including, but not limited to, student performance on standardized tests such as performance based on the Illinois Goals and Assessment Program Test or the Iowa Test of Basic Skills, successful completion of the curriculum, attendance, and drop-out rates; (2) review the curriculum and instructional services; and (3) report to the school board on his finding as to (a) student performance and (b) recommendations, if any, for curriculum or instructional changes as a result of his evaluation of student performance.

b. The presentation of the report shall constitute the achievement of the goals and indicators of student performance and academic improvement as required by Section D.2 of this Contract and Section 10-23.8 of the *School Code*.

The above goals and objectives shall remain in force during the term of this contract and any extension thereof for the Board's use in measuring the performance and effectiveness of the Superintendent/Principal, unless modified in writing by amendment to this contract by mutual agreement of the parties.

If, at the end of any year of this contract, the Board and Superintendent/Principal mutually agree to extend the employment of the Superintendent/Principal, and the Board has determined that the Superintendent/Principal has met or exceeded the goals and indicators of student performance and academic improvements described in Section D.3 of this contract, the Board shall take specific action to discontinue this contract and enter into a new contract.

E. TERMINATION

1. This employment contract may be terminated by:

   a. Mutual agreement;

   b. Permanent disability (inability to perform essential job functions with or without accommodation);

   c. Discharge for cause; or

   d. Death.

2. Regular attendance and attention to the duties of the position being an essential function of the Superintendent/Principal's job, the Board may terminate this contract for reasons of permanent disability or incapacity at any time after the Superintendent/Principal has exhausted his accumulated sick leave and either has been absent from his

employment for a continuous period of three (3) months or presents to the Board a physician's statement certifying that he is permanently disabled or incapacitated. All obligations of the Board shall cease upon written notice of termination for permanent disability or incapacity, provided that the Superintendent/Principal shall be entitled to a hearing before the Board if he so requests. The Board reserves the right to require the Superintendent/Principal to submit to a medical examination, either physical or mental, to determine that the Superintendent/Principal is able to perform all job-related functions whenever the Board reasonably believes it necessary. Such examination shall be performed by a physician licensed to practice medicine in all its branches, who is selected and paid by the Board.

3. Discharge for cause shall be for any conduct, act, or failure to act by the Superintendent which is detrimental to the best interests of the School District. Reasons for discharge for cause shall be given in writing to the Superintendent, who shall be entitled to notice and a hearing before the Board to discuss such causes. If superintendent/Principal chooses to be accompanied by counsel at such hearing all such personal expenses shall be paid by the Superintendent/Principal. The Board hearing shall be conducted in executive session.

F. EVALUATION

The Board and Superintendent/Principal agree that annually they shall mutually discuss and evaluate their working relationship, rapport, and understanding. By May 1 of each year of the contract, the Superintendent/Principal's performance shall be appraised by the Board and a written evaluation of that performance given to the Superintendent/Principal., except in the final year of this contract for which such appraisal and written evaluation shall

be completed by March 1. After such evaluation, the parties may schedule a meeting to review the evaluation and determine, if necessary, the terms and conditions of the continued future employment of the Superintendent/Principal.

G. NOTICE

Any notice or communication permitted or required under this Agreement shall be in writing and shall become effective on the day of mailing thereof by first class mail, registered, or certified mail, postage prepaid, addressed:

If to the Board, to: President
Board of Education
Warren Community Unit School
District No. 205
109 Mary Street
Warren, Illinois 61087

If to the Superintendent/Principal, to: _____
_____
_____

or at the last address of the Administrator contained in official Business Office records.

H. TECHNICAL CLAUSES

1. This contract has been executed in Illinois and shall be governed in accordance with the laws of the State of Illinois in every respect.

2. Paragraph headings and numbers have been inserted for convenience of reference only, and if there shall

be any conflict between such headings or numbers and the text of this Contract, the text shall control.

3. This contract contains all terms agreed upon by the parties with respect to the subject matter of this contract and supercedes all prior agreements, arrangements, contracts and communications between the parties concerning such subject matter, whether oral or written.

4. Except as may otherwise be provided, no subsequent alteration, amendment, change or addition to this Agreement shall be binding upon the parties unless reduced to writing and duly authorized and signed by each of them.

5. This Contract may be executed in one or more counterparts, each of which shall be considered an original, and all of which taken together shall be considered one and the same instrument.

6. The Board retains the right to repeal, change or modify any policies or regulations which it has adopted or may hereafter adopt, subject however, to restrictions contained in the *School Code* and other applicable law.

7. If any provision, paragraph, phrase, clause or word contained herein is held to be void, invalid or contrary to law by a court of competent jurisdiction, it shall be deemed removed herefrom, and the remainder of this Agreement shall continue to have its intended full force and effect.

SIGNATURE PAGE FOLLOWS.

IN WITNESS WHEREOF, the parties have executed this Agreement on the dates stated below.

Superintendent/Principal

/s/_____
Kelly Baird

8/16/00
Date

BOARD OF EDUCATION OF
WARREN COMMUNITY UNIT
SCHOOL DISTRICT NO. 205,
JO DAVIESS COUNTY, ILLINOIS

By: /s/_____
Monica L. Stephan, President

8-16-00
Date

ATTEST:

/s/_____
Judy K. Gates, Secretary

8-16-00
Date

(2)

No. 04-1303

In the Supreme Court of the United States

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205; MONICA STEPHAN, ANNELISA CLEARY, et al.,
Petitioners,

v.

KELLY BAIRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

JOHN B. MURPHEY
Counsel of Record

ROSENTHAL, MURPHEY & COBLENTZ
30 NORTH LASALLE STREET
SUITE 1624
CHICAGO, IL 60602
(312) 541-1070

Counsel for Respondent
Kelly Baird

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether the Seventh Circuit correctly found that under the circumstances presented in this case, the Petitioners were obligated to provide Baird with a pre-termination hearing that fully complied with due process.

2. Whether the Seventh Circuit correctly decided that under the circumstances of this case, when a public employee is terminated for cause, and when the only available post-termination remedy is the opportunity to bring a breach of contract lawsuit, the pre-termination hearing to which such an employee is entitled must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirement of bare notice and opportunity to be heard.

3. Whether the Seventh Circuit correctly found that the individual defendants are not entitled to qualified immunity.

LISTING OF PARTIES TO THE PROCEEDING

The petition correctly state the names of all parties to this case.

STATEMENT PURSUANT TO RULE 29.6

Respondent is an individual and thus no disclosure statement is required pursuant to Rule 29.6.

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent Kelly Baird ("Baird") respectfully opposes the petition for writ of certiorari and requests that the petition be denied.

JURISDICTION

The jurisdictional statement set forth in the petition correctly sets forth jurisdiction.

INTRODUCTION

This Court decided *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) some twenty years ago. *Loudermill* definitively held that a public employee with a protected property interest in continued employment has a right to pre-termination due process. In approving less than a full pre-termination hearing – one without a right to representation by an attorney or notice as to the evidence against him or the right to cross-examine witnesses – this Court explicitly relied upon a state statute which gave such rights in a prompt post-termination administrative proceeding: "Our holding rests in part on the provisions in Ohio law for a full post-termination hearing." 470 U.S. at 546.

The Seventh Circuit's appropriately strong worded opinion ("Opinion") correctly found that the shameful "kangaroo court" procedures utilized by Petitioners in this case missed the constitutional mark "by a country mile." The Opinion's core holding is that when a public employee possessing a property interest is fired for cause, when there are no prompt post-termination administrative or contractual procedures made available, and when the terminated employee

is relegated to a time consuming and expensive state court breach of law contract lawsuit, that employee is entitled to full pre-termination due process before he is fired.

This rule clearly flows from *Loudermill*. It is a rule which has been followed by every federal circuit and state appellate court considering the issue. It is a rule which was clearly evident at the time these "petty and maladroit" Petitioners decided to fire Baird. The Opinion is correct. It is fair. Perhaps most importantly, it will promote reasonable resolution of employment disputes in similar contexts.

Because the Opinion is consistent with this Court's jurisprudence, as well as every case considering the issue, the petition should be denied. Baird should finally have the opportunity to have his case heard by a jury.

STATEMENT OF THE CASE

Petitioners understandably give short shrift to the facts of this case. The Opinion found the undisputed facts demonstrate appalling conduct by the defendants. While the Opinion correctly sets forth the facts, we believe it is important for this Court to review the facts in full. Page references are to the Record before the Court of Appeals.

In August, 2000, the Board hired Kelly Baird as Superintendent of Schools and Principal of Warren, Illinois School District 205 (collectively, "Superintendent") (Doc. #27, 56.1(a)(3) stmt, ¶5; Doc. #19, Ans., ¶6). The parties signed a three-year contract (the "Agreement"). (Doc. #27, ¶8; Doc. #19, ¶9). The individual defendants were among the members of the Board of Education (Doc. #27, ¶3).

The Agreement covered the 00-01, 01-02, and 02-03 school terms. The Agreement was subject to termination for cause. By virtue of the term of the Agreement and the limitations regarding bases for termination, the Agreement conferred Baird a property interest in continued employment entitling him to due process in connection with the deprivation thereof. *Id.*

Shortly after Baird was hired, Defendants Cleary, Vincent and Stephan began talking to District employees, who would give them information complaining about Baird. (Doc. #48, ¶1; Doc. #47, Vol. 2, Exh. D, Cleary dep., pp. 154-5; Exh. I, Vincent dep., pp. 21-23).

The Agreement required Baird to attend regional conferences. (Doc. #48, ¶4). Between October 4-6, 2000 Baird attended at the Illinois State Board of Education's 23rd Annual Superintendent's Conference. (Doc. #48, ¶5; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 1). The Conference was held at a hotel in Springfield, Illinois and the District paid for Baird's registration. *Id.* The phone number of the hotel was listed on the registration form that was in the possession of the District offices. *Id.* The Board expected Baird to attend the conference. *Id.*

On October 5, 2000, a problem occurred with the public water supply to Apple River School. A "boil order" was issued. (Doc. #48, ¶6; Doc. #47, Vol. 2, Exh. D, p. 118). Cleary became aware of the problem and was upset that Baird was not present in the School District on that date . (Doc. #48, ¶7; Doc. #47, Vol. 2, Exh. D, pp. 121, 148). Cleary never asked Baird where he was. He was at the conference. Instead, she concluded he simply was derelict in his duties. (Doc. #48, ¶8; Doc. #47, Vol. 2, Exh. D, pp. 121, 148). Cleary then met with one of the school secretaries, Sally

Roberts. (*Id.*; Doc. #47, Vol. 2, Exh. D, pp. 121-128, 158-159). Cleary did not advise Baird that she was talking to Roberts. *Id.* Roberts furnished Cleary with a list of dates Roberts was compiling regarding Baird's whereabouts since the beginning of the 2000-2001 school term. *Id.*

On October 10, 2000 Cleary submitted a memorandum to Baird. (Doc. #48, ¶9; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 2; Doc. #47, Vol. 2, Exh. D, pp. 148-149). The memorandum was purported to be jointly authored by Cleary and Stephan. (Doc. #48, ¶9; Doc. #47, Vol. 2, Exh. H, Stephan dep., pp. 27-28). In the October 10 memo, Cleary expressed that both she and Stephan had "substantial concern about our ongoing relationship," and complained Baird was "unavailable a great deal of the time." (Doc. #48, ¶10; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 2). Cleary had no first-hand knowledge regarding Baird's attendance. (Doc. #48, ¶10). Cleary also complained about the fact that Baird had purchased a cell phone, but did not use a local vendor. (Doc. #48, ¶10; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 2).

Cleary's memorandum falsely represented to Baird that Stephan was "concerned that the morale of the faculty and staff was very low. . .a sign that mutual respect is not being built." Cleary admitted she had no basis for that statement. (Doc. #48, ¶12; Doc. #47, Vol. 2, Exh. D, p. 134). Cleary claimed that a number of employees came up to her and told her morale at the school was bad, but Cleary never mentioned any of these names to Baird. (Doc. #48, ¶17; Doc. #47, Vol. 2, Exh. D, p. 155). In contrast to her October 10 memo and assertions regarding what employees told her, Cleary testified in her deposition that she told Baird "Our teacher morale was high and we'd like to keep it there." (Doc. #48, ¶14; Doc. #47, Vol. 2, Exh. D, p. 134).

Although Cleary claims she was not aware that Baird was fulfilling his contractual duties at the Superintendents Conference on the date that the boil order was issued, Stephan was aware of it, knew that the contract called for him to go to conferences such as the October 5 conference, and had no criticism of Baird for going to the conference. (Doc. #48, ¶13; Doc. #47, Vol. 2, Exh. H, p. 31). Baird's absence from the District on the "boil order" day was later used as a basis for his termination.

Stephan and Cleary met with Baird on October 10, 2000. (Doc. #48, ¶15; Doc. #47, Vol. 2, Exh. H, p. 39). Stephan never told Baird she was concerned with him leaving early on Friday and arriving late on Monday. *Id.* In response to the concerns expressed by Stephan and Cleary, Baird agreed that he would limit his out of District activities even though he pointed out that these activities generally took place in the fall. (Doc. #48, ¶15). Among other things, Baird cancelled his proposed attendance at a law conference sponsored by the School District's law firm that was scheduled for the following day, October 11, 2000. (Doc. #48, ¶15; Doc. #47, Vol. 1, Exh. A, Baird's Exh. 3).

During the October 10, 2000 meeting the parties also discussed Baird's cell phone purchase. (Doc. #48, ¶16). Although Cleary said she "didn't think of the cell phone being a problem," she was upset that Baird did not use a local vendor. (Doc. #48, ¶16; Doc. #47, Vol. 2, Exh. D, p. 152). Stephan was similarly upset, even though she had no idea of the cost implication of Baird's decision. (Doc. #48, ¶16; Doc. #47, Vol. 2, Exh. A, pp. 35-36). There are no Board rules requiring the use of local vendors. (Doc. #48, ¶16).

Unbeknownst to Baird and most of the other Board members, Cleary and Vincent engaged in a clandestine

"investigation" of Baird. They directed a member of the clerical staff to put together a listing of his whereabouts. (Doc. #48, ¶19; Exh. 2; Doc. #47, Vol. 2, Exh. D, p. 158). This was done without any authorization of the Board of Education. (*Id.*; Doc. #47, Vol. 2, Exh. D, p. 140).

Cleary and Vincent began to meet and talk about getting rid of Baird. (Doc. #48, ¶20; Doc. #47, Vol. 2, Exh. D, pp. 161-62 and Exh. I, Vincent dep., p. 39). Vincent was performing her own "investigation" into Baird. (Doc. #48, ¶20). An employee told Vincent that Baird had thrown away old files belonging to the School District. (Doc. #48, ¶20; Doc. 47, Vol. 2, Exh. I, p. 23). Vincent never checked with Baird as to the nature of the files, whether they were of any value to the District, or whether they were appropriate for disposal. *Id.* In spite of having absolutely no knowledge of what was in the files and without ever consulting Baird, Vincent concluded this was an exercise of "poor judgment" by Baird. (Doc. #48, ¶20; Doc. #47, Vol. 2, Exh. I, pp. 28-29).

Vincent also concluded Baird was "lapsing" into nonattendance in late October, but she never mentioned the matter to the Superintendent, even though she frequently came to the school building to drop her daughter off at school. (Doc. #48, ¶21; Doc. 47, Vol. 2, Exh. I, pp. 30-31). After Cleary and Vincent obtained the list from the secretary regarding Baird's alleged whereabouts during September and October 2000, they continued their unauthorized "investigation" of Baird. (Doc. #48, ¶22; Doc. #47, Vol. 2, Exh. D, pp. 38-39).

Cleary and Vincent met on multiple occasions in late October and early November to assemble their views about Baird into written form for distribution to the Board. (Doc.

#48, ¶23; Doc. #47, Vol. 2, Exh. D, p. 161). As a result of these meetings, Cleary and Vincent prepared two drafts of a confidential memorandum to their fellow Board members. (Doc. #48, ¶23; Doc. #47, Vol. 1, Exh. A, dep. exh. 4, 4A). The two memoranda are substantially the same, except Exhibit 4's ten point "Opinion Statement" setting forth the view of Cleary and Vincent was edited out of the Exhibit 4A final version that was distributed to the Board members. (Doc. #48, ¶24). The memorandum included the secretary's reports setting forth Baird's supposed whereabouts. *Id.*

In the opening paragraphs, Vincent and Cleary frankly admitted that "neither of us feels that Dr. Baird is a 'good fit'" with them. (Doc. #48, ¶25). Cleary meant she decided Baird was not committed to the school district. (Doc. #48, ¶25, fn. 1; Doc. #47, Vol. 2, Exh. D, p. 165). Vincent meant that she was not "happy with the whole situation." (Doc. #48, ¶25, fn. 1; Doc. #47, Vol. 2, Exh. I, p. 37).

Both Cleary and Vincent admitted in their depositions that the ten point Opinion Statement accurately reflected their view of Baird as of November, 2000, less than three months after Baird started his job. (Doc. #48, ¶28; Doc. #47, Vol. 2, Exh. D, p. 196 and Exh. I, pp. 51-52). It was the opinion of Cleary and Vincent that Baird: 1) "Has no intention of being a principal for our elementary students"; 2) "Has little or no respect from the faculty or staff."; 3) "Has put little or no effort into engaging our students in anything."; 4) "Has no respect for us or our District."; 5) "Has no respect for our financial well-being"; 6) "Is not providing a desirable image of our community."; 7) "Is not providing support to our junior high/high school Principal."; 8) "Has questionable judgment."; 9) "Is increasingly difficult to trust."; and 10) "Has questionable value to the District." (Doc. #48, ¶29).

The Vincent-Cleary Memorandum was disseminated to some, but not all of the Board members; for example, Green did not receive a copy. (Doc. #48, ¶30; Doc. #47, Vol. 2, Exh. F, Green dep., p. 13). Even though the Board of Education had a meeting a few days later (November 15, 2000), the Board members never discussed the Vincent-Cleary memo at that time or at any other Board meeting. (Doc. #48, ¶31; Doc. #47, Vol. 2, Exh. H, p. 61). The Board did not share the memorandum or any of the underlying concerns with Baird at any time during Baird's employment. (*Id.*; Doc. #47, Vol. 2, Exh. H, pp. 57, 61).

By letter dated December 5, 2000, Vincent sent a two-page letter (the "Vincent Memorandum") to Stephan regarding rumors she had heard about Baird. (Doc. #48, ¶41; Doc. #47, Vol. 1, Exh. A, dep. exh. 7). Vincent was continuing her "investigation" of Baird by having a secretary give her Baird's cell phone records. (Doc. #48, ¶41; Doc. #47, Vol. 2, Exh. I, p. 70). Among other things, the Vincent Memorandum states:

- That Vincent is "so disgusted by his performance that I have not done a thing to help with the forthcoming referendum." [Emphasis added]

- That Cleary has asked Vincent to ask the school secretary "about the phone records" of Baird since Cleary was told that Baird was having extended cell phone conversations with a woman.
- That the secretary also told Vincent Baird was interviewing for another job in Fox Lake, Illinois. Vincent expressed this acid view about Baird: "Unfortunately, my baby sister, a sister who is due to have a baby in 2001, lives in Fox Lake–I'd

be concerned, but I'm sure [Baird] won't be there in five years ..."

- That "my opinion is that he cannot leave too quickly–yesterday would have been fine with me." [Emphasis added]

Vincent closes with this rhetorical question:

I wonder if we should call our attorneys about our rights and responsibilities if he breaks his contract. I hesitate to do it since they charged us over $1400 to change about ten words in the contract, but if he doesn't break the contract–I would sure like to ... Please let me know what you think ... [Emphasis added]

By this time Vincent had concluded that Baird was not "working for the District." (Vincent 77). Vincent never told her fellow Board members about her continuing investigation. (*Id.*; Doc. #47, Vol. 2, Exh. I, p. 72). Stephan never reviewed the Vincent Memorandum with the Board and never spoke to Baird about it. (Doc. #48, ¶47; Doc. #47, Vol. 2, Exh. H, pp. 79-80).

When the Board of Education met to evaluate Baird, each Board member filled out the evaluation form and gave their forms to Vincent. (Doc. #48, ¶74). After consulting with the school attorney, the Board designated Vincent to prepare the Evaluation, in spite of her attitude displayed in the December Letter, her hatred of Baird, and her expressed desire to break Baird's contract ("... if he doesn't break the contract, I would sure like to ..."). (*Id.*; Doc. #47, Vol. 2, Exh. H, pp. 93-94). The Board Members did not make any changes to Vincent's draft. (Doc. #48, ¶75; Doc. #47, Vol. 2, Exh. H, p. 96).

As Board President, Stephan did not believe that it was necessary for the Board–as a group–to hear from any of the individual accusers who had spoken to one or more of the Board Members on an individual basis. (Doc. #48, ¶76; Doc. #47, Vol. 2, Exh. H, pp. 102-103).

On or about April 18, 2001, the Board presented Baird with a document described as an evaluation of his performance as Superintendent during the 2000-'01 school year (the "Evaluation"). (Doc. #27, ¶15; Doc. #47, Vol. 1, Exh. A, Dep. Exh. 9). The Board also presented Baird with a letter dated April 18, 2001. (Doc. #27, ¶15 and Exh. 5; Doc. #19, ¶23). The letter notified Baird of the Board's intent to terminate the Agreement (Doc. #27, ¶16 and Exh. 5).

In a May 1, 2001 letter to Board President Stephan, Baird's attorney requested a hearing. (Doc. #27, ¶17). Baird also requested copies of underlying documents and the names and addresses of the numerous unnamed individuals whose reports furnished much of the basis for the Evaluation. (*Id.* and Exh. 6; Doc. #19, ¶24). The letter also requested that Board members Stephan, Vincent, Cleary and Gates recuse themselves. (Doc. #27, ¶17 and Exh. 6).

The attorneys for the Board of Education responded in writing a few days later. (Doc. #27, ¶18 and Exh. 7; Doc. #19, ¶26). The letter denied Baird's request for the enumerated documents; denied the request for names; denied a continuance; advised that the Board would not "call witnesses to testify, or present documents other than that which Baird already received; his evaluation instrument." (Doc. #27, ¶18 and Exh. 7). The letter set forth the Board's legal position "that the due process required under these

circumstances is the right to receive notice and the opportunity to be heard." *Id.* The letter also advised that at the informal hearing a single Board member "will present the case" against Baird. *Id.* The letter limited Baird's ability to question Board members; the attorneys "will require that questioning of Board members be limited to...issues on which he or she spoke." *Id.*

On May 16, 2001, Baird's attorney responded to the May 9, 2001 letter. (Doc. #27, ¶21; Doc. #19, ¶26), objecting to the procedures to be used. That same night, the Board convened for purposes of the hearing. (Doc. #27, ¶22). Baird appeared at the hearing and protested what he claimed to be contractual and due process violations. *Id.* The Board proceeded to consider Baird's termination. (*Id.*; Doc. #19, ¶28.). At the conclusion of its deliberation, the Board of Education voted to terminate the Agreement purportedly for cause. (Doc. #27, ¶23). Subsequent to the Board's May 16, 2001 vote, the Board forwarded to Baird a copy of a Resolution of Termination. (*Id.* and Exh. 9; Doc. #19, ¶29).

THE OPINION

The Opinion came down on November 14, 2004. 389 F.3d 685 (7th Cir. 2004). The Opinion carefully reviewed this Court's procedural due process jurisprudence. After reviewing *Loudermill* and this Court's caution that "the existence of post-termination procedures is relevant to the necessary scope of pre-termination procedures," the Opinion held that "a post-termination law suit for breach of contract" does not "remedy the full due process deficiency in the pre-termination proceedings."

The Opinion next turned to this Court's decision in *Lujan v. GNG Fire Sprinklers, Inc.*, 532 U.S. 189 (2001). Unlike

Lujan, the Opinion found that this case clearly involves "a present entitlement" to continued employment. After reviewing various cases which this Court distinguished in *Lujan*, such as *Barry v. Barchi*, 443 U.S. 55 (1979), *FDIC v. Mallen*, 486 U.S. 230 (1988) and *Sniadach v. Family Finance Corporation of Bayview*, 395 U.S. 337 (1969), the Opinion found that the "post-deprivation remedies appropriate to the deprivation of an interest to which there is a present entitlement are characterized by promptness and by the ability to restore the claimant to possession ... The remedy [must be] available before the loss has become complete and irrevocable." 389 F.3d 692.

The Opinion then found that a state court breach of contract action "is not an adequate post-termination remedy for a terminated employee who possesses a present entitlement and who has been afforded only a limited pre-termination hearing." *Id.* The Opinion reaches the common sense conclusion that a time consuming and burdensome state court lawsuit does not satisfy the due process requirement of promptness. The Court also noted other aspects of the significant private interests at stake. The Court then concluded that when a public employee had a present entitlement procedural due process interest, and when the only available post-termination remedy is the opportunity to bring a state court breach of contract action, the pre-termination hearing to which the employee is entitled "must fully satisfy the due process requirements of confrontation and cross-examination in addition to the minimal *Loudermill* requirement of notice and an opportunity to be heard."

Applying the rule to the present case, the Opinion found the "undisputed" fact that Baird had a protected property interest in remaining in his position under his contract for the remaining two years and in being compensated accordingly.

Baird's present entitlement also meant that he had a right to seek reinstatement if his rights had been violated. The Opinion accordingly found that "the Board was obligated to provide a pre-termination hearing that fully complied with due process." 693. This it failed to do.

Turning to the actual process which was provided, the Opinion saw through the same misrepresentations being made by Petitioners to this Court; namely that Petitioners had provided Baird with reasonable pre-termination process. The Opinion found that while "Baird was ostensibly afforded the opportunity to call and question witnesses, the Board effectively emasculated this provision by refusing to furnish him with the names of district employees who had acted as undercover school board informants. Baird was allowed to question board members – but only about matters as to which they had spoken. What the Board gave to Baird with the left hand, it seemed to take away with the right, leaving Baird with a pre-termination hearing that may have satisfied a bare bones *Loudermill* standard, but little else."

As to the argument that the passage of time has now exceeded Baird's contract term, the Opinion correctly found that the kind of remedies that conform to due process "must be available promptly and must generally include the possibility of reinstatement. Otherwise they are not adequate to address the loss of a present entitlement."

The court noted that its ruling was completely consistent with the "persuasive reasoning" of the Tenth Circuit in *McClure v. Independent School District No. 16*, 228 F.3d 1205 (10th Cir. 2000). 693. *McClure* held that a school principal who is terminated in mid-term has a procedural due process right to confront and cross-examine on a pre-termination basis. *McClure* "underscores the importance of

cross-examination here, for the opportunity for confrontation was even more fully denied here where Baird was deliberately prevented from ascertaining the identify of his accusers." The Opinion further noted that "Seventh Circuit precedent is to the same effect." *Id.*

The Opinion next held that Baird did not waive his right to a fair hearing by refusing to participate in an unfair hearing. The court found that "under the present facts, when the plaintiff has requested reasonable safeguards and has been flatly denied both before and at the hearing and when nothing useful could apparently be gained by continuing participation, we will not find a waiver as a matter of law." 695.

Finally, the Opinion rejected the contention that the individual board members were entitled to qualified immunity. 696. The procedures they utilized "were severely deficient." The Opinion concluded that since numerous cases have defined the contours of what process is due to a public employee, the Opinion found that the law on this point was clearly established. The case has now been remanded for trial.

REASONS FOR DENYING THE PETITION

The Opinion is faithful to this Court's procedural due process cases. Its holding is consistent with every court of appeals decision considering similar questions. Three courts of appeals have now considered the precise question here and all have reached the identical conclusion: when a prompt post-deprivation hearing is not available, procedural due process requires that the pre-termination hearing provide a public employee with essential elements, such as right to representation by counsel and right to confront and cross-examine his accusers.

A. The Opinion is Consistent with this Court's Procedural Due Process Jurisprudence

Loudermill makes it clear that the abbreviated pre-termination hearing serves only "as an "initial check" against wrongful termination in light of the government's contravaling interest in removing a potential disruptive employee. *Loudermill* found that minimal due process was sufficient because of "the provisions of Ohio law for a full post-termination hearing." 470 U.S. 546. Under Ohio law, "a discharged civil service employee was entitled to administrative proceedings" by virtue of a prompt hearing with the State Personnel Board. 470 U.S. at 539-540, n.6.

Twelve years later, this Court decided *Gilbert v. Homar*, 520 U.S. 924 (1997). *Gilbert* underscored this point that a public employer may rely on a minimal *Loudermill* hearing only if there is a prompt post-termination hearing mechanism. "In [*Loudermill*] we concluded that a public employee dismissible only for cause was entitled to a very limited hearing prior to his termination to be followed by a more comprehensive post-termination hearing." 520 U.S. at 929. Taken together, *Loudermill* and *Gilbert* hold that a public employer may provide a minimal pre-termination *Loudermill* hearing if – and only if – that public employer follows up by making available a prompt post-termination hearing providing fully adequate due process. *Gilbert's* conclusion flows inevitably. It is the conclusion this Court recognized in 1987 when it underscored that a minimal *Loudermill* hearing is appropriate only if "a prompt opportunity for complete administrative and judicial review is available." *Brock v. Roadway Express*, 481 U.S. 252, 261-262 (1987). *Gilbert* itself was a suspension case. The court found that minimal pre-suspension process was constitutional only so long as the

suspended employee "receives a sufficiently prompt post-suspension hearing ..." 520 U.S. at 932.

Petitioners have not cited one decision from any jurisdiction holding that notwithstanding a public body's responsibility to provide full procedural due process before termination of a tenured public employee becomes final, a state court breach of contract action provides such process. The Seventh Circuit was correct in determining that *Lujan* does not change this universal line of reasoning in the public employee context. *Lujan* did no even mention *Loudermill*. This Court found that a state court breach of contract action was adequate due process only because the claimant was not "denied a right ... he was presently entitled to [such as the right to] pursue a gainful occupation." *Lujan*, 532 U.S. at 196. *Lujan* distinguished *Barry v. Barchi, supra*. The racetrack trainer in *Barry* was suspended for a mere 15 days on suspicion of horse drugging. This Court found he was entitled to a prompt post-deprivation administrative or judicial hearing to lift that suspension by virtue of the present entitlement embodied by his trainer's license. The Opinion correctly recognized that a school superintendent being fired deserves no less than the racetrack trainer, and that *Lujan* does not affect these clearly established principles.

Lower courts interpreting *Lujan* have had little difficulty finding that the "breach of contract" due process remedy has no bearing in the public employee termination context. *DeBoer v. Pennington*, 287 F.3d 748, 749 (9th Cir. 2002) (common law breach of contract not adequate due process when "the deprivation constitutes a denial of a present entitlement."); *Sahlolbei v. Providence Health Care, Inc.*, 112 Cal.App.4th 1137, 1154-5 (2003) (when the right to pursue a gainful occupation is at stake, *Lujan* is of no applicability because the right to pursue gainful employment

is a "present entitlement"); *Pappas v. City of Lebanon*, 331 F.Supp.2d 311, 319 N.D. Pa. (2004) (collecting cases). The Opinion correctly held that Petitioners conferred an unqualified right to a contractual benefit to Baird and confirmed satisfaction of all conditions to receipt of that benefit by paying him for one year of the three year contract. The Opinion was absolutely correct in determining that a common law breach of contract does not adequately protect a public employee's procedural due process rights. Baird had possessed a present entitlement to continued employment.

It requires little citation to endorse the Opinion's view that in a public employee termination case, a state court breach of contract action can never satisfy the promptness requirement. This lawsuit was filed in the summer of 2001. In the business of civil litigation 60 days is a procedural blink of an eye. The normal course of civil litigation with full discovery takes a minimum of two years to run its course (in large metropolitan areas such as Cook County, one can easily double the time). No reasonable person can argue with a straight face that waiting for years, spending tens of thousands of dollars, and watching his contract expire and his career evaporate is what this Court intended in allowing a bare *Loudermill* hearing only when there is prompt post-termination judicial or administrative process. In real world, real time terms, to allow such a regime would be to destroy any meaningful due process to employees like Baird. There is an inherent inequality of bargaining power when a government with endless resources deprives somebody's sole source of income.

One of the most important reasons why the Seventh Circuit Opinion should stand is because it makes it clear that when a public body confers a present entitlement property right on a public employee, it cannot trample on those rights and then rely upon a taxing body's superior resources by

telling the devastated employee, "If you don't like it ... sue us ... we have more money than you and we will bleed you dry with litigation costs." The Opinion serves as a significant reminder that public bodies must play on a level constitutional playing field.

The Opinion is consistent with this Court's procedural due process decisions. As we demonstrate below, it is also consistent with the overwhelming weight of authority throughout the country.

B. There is no Circuit Split on the Question Presented. The Opinion is Consistent with the Overwhelming Weight of Authority Throughout the Country.

The Opinion is consistent with the overwhelming weight of federal and state authority interpreting *Loudermill*. These cases also make clear that what generally qualifies for as a "prompt post-deprivation hearing" falls into two categories: (i) a prompt post-termination administrative hearing such as civil service commission hearing, merit board hearing, or personnel board hearing; or (ii) a prompt grievance/arbitration hearing where the employee may contest his termination and obtain reinstatement and back pay. In the former case, the state legislature has engrafted the post-termination procedures onto a termination decision. In the grievance/arbitration setting, the public employer has agreed to provide full and prompt post-deprivation due process. When neither is present, the public employer must provide a full pre-termination hearing.

Seventh Circuit.

Our Seventh Circuit has had little difficulty in setting forth these rules. The landscape was clear years before this case was decided. In *Swank v. Smart*, 898 F.2d 1247 (7th Cir.

1990), *cert. denied*, 498 U.S. 853 (1990), the Seventh Circuit recognized the "sliding scale" of procedural protection to be provided depending on whether the public employer makes full post-termination process available. The Seventh Circuit (at 1256) specifically found "if there is no provision for a post-termination hearing ... the pre-termination hearing [must] provide all the procedural safeguards to which due process entitled a tenured public employee.... A first hearing need not provide a full set of procedural safeguards if there is a chance for a second hearing before termination." 898 F.2d at 1256. *See also Wainscott v. Henry*, 315 F.3d 844 (7th Cir. 2003).

Tenth Circuit.

As the Opinion sets forth, the Tenth Circuit reached the same conclusion on a nearly identical set of facts. *McClure v. Independent School District No. 216*, 228 F.3d 1205 (10th Cir. 2000). The court (at 1211) found that although "the hearing at issue was a pre-termination hearing, it was the only one provided to Mrs. McClure. Consequently, our due process inquiry is governed by the requirements applied to post-termination hearings." After examining prior precedent, the court found that in a case like this, procedural due process requires "confrontation and cross-examination of those whose word deprives a person of his livelihood." *See also California v. Gaines*, 982 F.2d 1470, 1476 (10th Cir. 1992) (*Loudermill* "established some form of a pre-termination hearing plus a full blown adversarial post-termination hearing [unless such as included as part of the pre-termination proceedings] are required."); *Copelain-Brown v. New Mexico State Personnel Office*, 399 F.3d 1248, 1254-5 (10th Cir. 2005) (where the "pre-termination process offers minimal opportunity for the employee to present her side of the case, the procedures in the post-termination hearing become much

more important"; such hearing must be provided by the employer at a meaningful time after termination.)

Sixth Circuit.

The Sixth Circuit has consistently held in a manner consistent with the Opinion. *Carter v. Western Reserve Psychiatric Habilitation Center*, 767 F.2d 270 (6th Cir. 1985). Of particular significance in the present context is the Fourth Circuit's more recent decision in *Mitchell v. Fankhauser*, 375 F.3d 477 (6th Cir. 2004). In *Mitchell*, a custodian with a protected property interest was fired by the school board after only a minimal pre-termination meeting. The court found a procedural due process violation because plaintiff "was not afforded a post-termination hearing; in fact [the school district] has no post-termination process." 375 F.3d at 481. *Mitchell* is significant because it rejects the "random and unauthorized" defense which Petitioners are really asserting in this case (because the State of Illinois judicial system might provide a partial remedy, that remedy cures a prior violation by the public employer). *Mitchell* correctly held that the due process deprivation was not the result of a random or unauthorized act. *Mitchell* clearly holds that because the board of education did not itself provide adequate post-deprivation due process, it must provide full pre-termination process.

Fourth Circuit.

The Fourth Circuit has long held that minimal pre-deprivation process is acceptable only if the terminated employee "is entitled to full administrative hearing with panoply of rights attaching to such hearing, and should he be dissatisfied with the administrative decision is entitled to a judicial review ..." *McClelland v. Massinga*, 786 F.2d 1205, 1213 (4th Cir. 1986); *Garraghty v. Commonwealth of*

Virginia, 52 F.3d 1274, 1283-1284 (4th Cir. 1995) (collecting cases).

State Courts.

The following state court decisions are consistent with the central holding of the Opinion that confrontation and cross-examination are necessary before the employer finalizes its decision. *Grice v. City of Kissimmee*, 697 So.2d 186, Fla.App. 5 Dist. (1997) ("if the city is going to terminate someone on the basis of the testimony of other witnesses, then the [employee] must as a matter of constitutional due process at some point – either at a pre-termination hearing or at a post-termination hearing – be permitted to confront those witnesses and cross-examine them."); *Case v. Shelby County Civil Service Merit Board*, 98 S.W.3d 167 Tn. Ct. App. (2002) ("... where the decision to terminate employment turns on determinations of issues of fact, due process requires an opportunity confront and cross-examine witnesses ..."); *Ohio Association of Public School Employees v. Lakewood City School District Board of Education*, 68 Ohio State 3d 175, 624 N.E.2d 1043 Ohio (1994) (collecting cases); *Colquitt v. Rich Township High School District No. 227*, 298 Ill.App.3d 856, 232 Ill.Dec. 924 (1st Dist. 1998); *Camlin v. Beecher Community School District*, 339 Ill.App.3d 1013, 274 Ill.Dec. 331 (3rd Dist. 2003).

Of course, Petitioners ignore all of these cases. These cases demonstrate an inescapable fact. When a public employer confers a property interest on an employee, that interest cannot be deprived without full procedural due process. In a case like this, where the employer provides no such process either pre or post-termination, a procedural due process violation occurs. A subsequently filed state court lawsuit does not cure that violation. In light of this background, Petitioners' contention (at 19) that the Opinion

"dramatically changes the landscape for all public bodies in the country" is nonsense.[1] Petitioners' contract-as-due process remedy argument makes no common sense. The Petitioners granted Baird the property interest. They didn't have to. It is they who have the responsibility of providing him due process before they finally deprive him of his property.

Loudermill and its progeny give public bodies two options. First, they can have an "initial check" pre-termination hearing and then terminate the employee if they have a compelling need to remove him from the premises. Under this scenario, they must then provide the employee with a post-termination hearing before the decision becomes final. Second, they could choose to provide a pre-termination hearing with the employee having the traditional rights of notice, confrontation and cross-examination.

Under either scenario, it is the public employer who has the obligation to provide due process. In simplest terms, these Petitioners want to shirk their duty to provide due process. Neither the Circuit Court of Jo Daviess County, nor the Northern District of Illinois is Baird's employer. The courts are present to correct due process violations, not to serve as a surrogate due process hearing body for this public body several years after the fact, long after the man's career is destroyed by the stigma of a for-cause termination.

Make no mistake. When it is stripped to the bone, Petitioners' position is abhorrent to the notions of fundamental

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[1] It is understandable why the attorneys for Petitioners are making such an overstated, irresponsible argument. After all, it was their advice which missed the constitutional mark by a country mile.

fairness which embody procedural due process. The Petitioners are asking this Court to approve an arrogant abdication of fairness. Petitioners would like this Court to endorse a "process" whereby a board could hire a superintendent, give him a contract, invite him to uproot his family and life, and then, on the merest whim, terminate that contract. Sure, the board would give him a pro forma, meaningless sham of a hearing (we'll pretend we'll listen to him, then we'll fire him). Deprive him of his income and his future job earning potential, and then dare the unemployed and disgraced employee to "take us to court."

We respectfully submit that the mean-spirited actions of Petitioners have no place in our democracy or this Court's jurisprudence.[2] The Opinion correctly balanced the competing interests in this case.

C. The Opinion Promotes Fairness and Federal Judicial Economy.

Perhaps one of the most important long-range observations of the Opinion is footnote 4. In articulating the various balancing factors inherent in a due process analysis, the Opinion appropriately concludes that by providing full pre-termination due process rather than providing minimal process and inviting a lawsuit, public bodies will actually act more responsibly and will conserve the public purse. It is "expensive and time consuming to hire and fire and so the

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[2] As we discuss more fully in our discussion of the qualified immunity issue, the Seventh Circuit's unusually strong language condemning the conduct of these Petitioners is well justified. The petition likewise demonstrates that a leopard doesn't change its spots.

government also has an interest in verifying that the purported 'cause' of termination is legitimate." It is "more efficient to ensure that a pre-termination hearing comports with due process when an employee to be terminated 'for cause' possesses a present entitlement than it is to defend a lawsuit."

We respectfully submit that this irony has been lost on Petitioners. By providing Baird with a constitutionally appropriate hearing, Petitioners could have saved hundreds of thousands of public dollars in litigation costs. It could have conserved its fiscal and administrative resources for far more important educational purposes. From an institutional standpoint, the Opinion really lies in the best interest of public bodies. By leaving the Opinion undisturbed, this Court will help to make sure that employment disputes will be resolved in state court where they belong.

Perhaps one of the best indicators of the correctness of the Opinion is that it has been applauded by at least one legal school law commentator Dowling-Sendor," "When Firing Backfires/If You Intend to Terminate an Employee ,You Have to Follow the Rules," *American School Board Journal*, April 2005, Vol. 192, No. 4; www.asbj.com/2005/04/0405schoollaw.html. The commentator concludes:

> Even though Baird could have pursued his rights to present and confront witnesses at a lawsuit, he would not have been able to obtain a prompt resolution of the termination dispute. To paraphrase Shakespeare, when it comes to termination disputes, "promptness is all." ... A discharge dispute can generate heated emotions but the procedures for resolving such a dispute must comply with rules established by the U.S. Constitution, state law and board policies. Indeed, it's the very danger that emotions might

> overwhelm reason and fairness that makes it essential to follow procedural rules that are designed to insure a full and fair inquiry.

The Opinion is an eloquent and decisive call to fairness. It should not be disturbed. It will be a boon to fair and honest decisionmaking in the public employment context.

D. The Opinion Correctly Found that the Individual Board Members were not Entitled to Qualified Immunity.

In assessing the Opinion's qualified immunity ruling, it is significant to note that the facts giving rise to the procedural due process claim are undisputed. Therefore, the matter was ripe for the Opinion's adjudication of this issue.

When an opinion of a Court of Appeals uses language such as found in this case, the egregiousness of the defendants' conduct is inescapable. Petitioners engaged in an "on the sly investigation" of Baird. Their "evaluation" document was really "accumulated tidbits of derogation." The conduct of the board members was at a minimum "petty and maladroit." Whatever minimal due process they were offering at the pre-termination hearing was "effectively emasculated" by their refusal to furnish Baird "with the names of district employees who had acted as undercover school board informants," and by their refusal to allow Baird to question board members about matters other than "to which they had spoken." Even if Baird had agreed to participate in this truncated forum, "the hearing would still have missed full due process by a country mile." The procedure they offered was "toothless." It was "a kangaroo court." Finally, it was clear that by the conduct of these board members "elementary fairness fell through the cracks."

Under these circumstances, the Opinion correctly found that the individual defendants were not entitled to qualified immunity. Quite apart from the horrible punitive conduct which the individual Petitioners actually evidenced, the simple fact of the matter is reasonable public officials should have known that Baird was entitled to considerably more process than what was provided in this case. *Loudermill* and *Gilbert* pointed the way. *McClure* decided just a year or so before this incident is precisely on point. There was plenty of Seventh Circuit and other circuit authority pointing the way. There was an abundance of state court authority.[3] Based on this overwhelming authority, the state of the law in 2001 gave Petitioners "fair warning that their alleged treatment of [Baird] was unconstitutional." *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). Plenty of Seventh Circuit precedent – not to mention *McClure* and the cases from other courts – pointed

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[3]In doing supplemental research for this petition response we continue to come upon other authority in the state courts for our position. In *Garner v. Michigan State University*, 185 Mich.App. 750, 462 N.W.2d 832, 837-8 (1990), the court found that *Loudermill* "clearly provides that the minimal pre-termination procedure which it outlined is not alone adequate to satisfy due process.... Subsequent federal decisions affirm that a post-termination hearing is required if the public employer elects to grant only a *Loudermill*-type pre-termination hearing. [Citations]. Because plaintiff was provided no post-termination process plaintiff was denied without due process his property right to continued employment...." *Garner* underscores an essential point. Any reasonable reading of *Loudermill* and its progeny compels a conclusion that significantly more process was required than was furnished here. A reasonable public official should have been on notice to almost two decades of interpretation of *Loudermill's* explicit caution.

the way to fairness. Petitioners chose a procedural hitching post approach to due process. They should answer in damages.

The Opinion correctly found and the authority cited above demonstrates that a reasonable public official should have known that procedural due process required more than what these Petitioners offered to Baird. The facts in this case are egregious. The Petitioners refused to provide Baird with the names of his accusers and refused to provide any meaningful opportunity to obtain or confront the evidence against him or cross-examine anyone about anything.

Under these circumstances, the Opinion correctly holds that it would be patently unfair to allow the presiding officers of the "kangaroo court" that "missed due process by a country mile" to escape potential personal liability. Baird should have his day in court and should be given an opportunity to present his evidence to a jury.

CONCLUDING REMARKS

In reviewing this petition, we ask the Court to consider the human elements in this case. Kelly Baird spent a quarter century working his way up the educational ladder. He moved from teacher to coach to principal to director to central office administrator. He finally reached the pinnacle of school superintendency. These jobs are few and far between.

His career has been wrecked by these petty and maladroit government officials. They smeared his reputation with "tidbits of derogation." They fired him without a semblance of the fundamental fairness due process requires. His career as an educational administrator is over. Instead of giving Baird a fair hearing, the individual Petitioners summarily

fired him and then said "sue me," knowing full well that they were being defended at taxpayer expense.

There is no reason to cry any tears for these people. Petitioners' characterization of these individuals as volunteers in jeopardy of losing their homes, their futures, and their families' financial well-being based on good faith decisionmaking is simply wrong. The doctrine of qualified immunity was specifically not intended to shield these public officials from the consequences of their meanspirited destruction of Kelly Baird's livelihood.

The Petitioners did not seek to stay the mandate of the Seventh Circuit. This matter is back before the district court. Kelly Baird should be allowed to present his case to a jury. By denying the petition and allowing the Opinion to stand, this Court will be significantly aiding reasonable and fair public sector procedural due process. Perhaps public bodies will now be more cognizant of their constitutional obligations, knowing now – with certainty – that in addition to providing *Loudermill* rights, they may need to provide *Baird* rights as well.

CONCLUSION

For the reasons set forth above the petition for writ of certiorari should be denied.

Respectfully submitted,

JOHN B. MURPHEY
Counsel of Record
ROSENTHAL, MURPHEY & COBLENTZ

Counsel for Respondent
Kelly Baird

(3)

No. 04-1303

Supreme Court, U.S.
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In the Supreme Court of the United States

BOARD OF EDUCATION FOR WARREN COMMUNITY UNIT SCHOOL DISTRICT NO. 205; MONICA STEPHAN, ANNELISA CLEARY, et al.,
Petitioners,

v.

KELLY BAIRD,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITIONERS' REPLY BRIEF

NANCY FREDMAN KRENT
Counsel of Record
ROBERT E. SWAIN
HODGES, LOIZZI, EISENHAMMER, RODICK & KOHN
3030 SALT CREEK LANE
SUITE 202
ARLINGTON HEIGHTS, IL 60005
(847) 670-9000

Counsel for Petitioners Monica Stephan, Annelisa Cleary, et al.

STEPHEN R. MILLER
LAURA L. SCARRY
MYERS, MILLER AND KRAUSKOPF
TWO NORTH LASALLE STREET
SUITE 1200
CHICAGO, IL 60602
(312) 345-7250

Counsel for Petitioner Board of Education for Warren Community School District No. 205

Becker Gallagher Legal Publishing, Inc. 800.890.5001

QUESTIONS PRESENTED

1. Whether an action for breach of contract constitutes adequate post-termination process for a contractual employee following a pre-termination *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985) hearing, or whether, as the Seventh Circuit held, a breach of contract action is insufficient post-termination process where no remedy of reinstatement is available?
2. If a breach of contract action is not adequate post-termination process, was the employee's right to a full trial-type pre-termination hearing "clearly established" so as to deprive the individual defendants of qualified immunity, as the Seventh Circuit held?

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REASONS FOR GRANTING THE PETITION

A. Introduction

In their petition, Petitioners identified several key reasons why certiorari should be granted. First, the Seventh Circuit's decision imposes significant new burdens on public bodies and public officials, requiring full trial-type pre-termination hearings where the post-termination process is provided through a state court trial. The Seventh Circuit's decision to eliminate entirely the state courts as part of the process a state may provide to an employee facing termination should be reviewed by this Court before being imposed on state and local governments. If left to stand, the Seventh Circuit's decision will require local governments to conduct their own full trial-type hearings, rather than rely on the process provided by state courts, vastly increasing the financial and resource burdens on those public bodies.

Second, the Seventh Circuit's decision contains fundamental errors of law, by requiring school boards to provide significantly more process than *Loudermill* requires when terminating an employee whose rights arise solely out of his employment contract. Respondent's claim that this is a natural outgrowth of *Loudermill* simply misapprehends that decision and its progeny. *Loudermill* explicitly authorizes abbreviated pre-termination hearings where the *state* (not necessarily the school board itself) provides access to full post-termination process. The Seventh Circuit's ruling that a state court breach of contract action is not sufficient post-termination process is, in fact, inconsistent with that decision.

Third, the decision conflicts with decisions of other Circuits. Respondent ignores these conflicting cases, citing instead to others which he claims support the opinion below. Those decisions do not address the issue raised here – whether the post-termination procedures provided by a state court breach of contract action satisfy *Loudermill*'s

requirement for full trial-type process. Nor do they address the conflict identified in the Petition: that the Seventh Circuit's decision creates a new constitutional right, a "right to remain in the position," remediable only by reinstatement, which conflicts with numerous appellate decisions rejecting such a claim.

Finally, the Seventh Circuit failed to apply the correct standard with regard to the qualified immunity issue. Respondent never addressed that failure, arguing instead that, because the Seventh Circuit characterized these school board members as "petty and maladroit," no further analysis of their claim to qualified immunity was required. Respondent appears to be arguing for a return to the subjective bad faith standard rejected by this Court in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), notwithstanding the fact that the Seventh Circuit did not make a finding of subjective bad faith. As this Court has repeatedly held, qualified immunity is an essential element of constitutional litigation, protecting public officials in the conduct of their responsibilities. This Court should grant certiorari not only on the procedural due process question, but also to ensure that the qualified immunity standard is properly applied in all federal courts, to protect all public officials, even those whom a court seems to dislike.

Because of the importance of the issues presented here, Petitioners repeat their request that the Court grant the petition for certiorari and settle these key questions of procedural due process and qualified immunity for local public officials.

B. This Case Raises Issues of Critical Importance and Contains Significant Errors of Law.

Respondent's brief, at least implicitly, acknowledges the importance of the Seventh Circuit's decision, by claiming that public employees will now have the benefit of something called "Baird" rights, over and above their *Loudermill* rights.

(Opp. at 28). Further, he identifies no other court which has faced this question – the sufficiency of a state court breach of contract remedy as post-termination process in an employment case, following a *Loudermill* pre-termination hearing. Nor does he explain his position that such a state court review could never constitute adequate post-termination process. Respondent claims that such a holding so clearly follows from this Court's prior decisions that no further consideration of it is necessary. The Petitioners respectfully disagree, both with that analysis and the conclusion. The Seventh Circuit's departure is not pre-ordained by *Loudermill*. To the contrary, *Loudermill* and numerous other decisions of this Court support the use of state court post-termination remedies.

The only facts relevant to the due process claim are those that relate to the process provided to Respondent.[1] Those facts clearly show that Petitioners provided well more pre-termination process than *Loudermill* required.[2] The only

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[1] Respondent begins his opposition with a colorful, if somewhat slanted, presentation of the facts leading up to his termination. Although Petitioners disagree with much of what was cited, this is not the proper forum in which to litigate the underlying question whether the School District had adequate cause to terminate the superintendent. That decision belongs, as the District Court concluded, before a state court hearing a breach of contract claim. Indeed, the recitation of "facts" presents, more clearly than any legal argument, a compelling case for determining that the appropriate, and indeed the only logical, post-termination proceeding should have been a breach of contract action where these facts could be finally determined.

[2] Rather than the "bare" notice that Respondent alleges, the School Board provided notice that included a detailed evaluation of the shortcomings in Respondent's performance, an evaluation that Respondent had refused to discuss with the Board. (App. 31a – 44a). The Board also informed Respondent that it would: provide documents, permit counsel to represent

question before the appellate court, under *Loudermill*, was whether sufficient post-termination process existed. The appellate court flatly rejected the notion that a state court breach of contract action, a remedy clearly available in this case, could satisfy the requirement for post-termination process.

Respondent argues that *Loudermill* and its progeny make the Seventh Circuit's ruling obvious. To the contrary, those cases call for the opposite result. The Seventh Circuit based its decision on the theory that, because Respondent was "presently entitled" to serve as Superintendent, this Court's decision in *Lujan v. G&G Fire Sprinklers, Inc.*, 532 U.S. 189 (2001), precludes a breach of contract action as sufficient post-termination process. This holding is based on a misconception of *Lujan*. *Lujan* held that a post-termination breach of contract claim is sufficient, even with no pre-termination process, when the claimant has no ongoing employment relationship. The Seventh Circuit then assumed the converse to be true – that such post-termination relief cannot be sufficient when the claimant does have such a relationship, overlooking the critical distinction that in this case both pre- and post-termination process were provided. The appellate court and Respondent appear to miss the salient fact that the *Barchi-Lujan* line of cases (*Barry v. Barchi*, 443 U.S. 55 (1979)) looks at the appropriateness and promptness

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him at the hearing, allow him to question school board member witnesses (although it limited his cross-examination to the scope of the witness's testimony), and allow him to present his own witnesses and evidence and testify to what absent witnesses would have said on his behalf. (Plaintiff-Appellant App. at A.37, docketed by 7th Cir. 3/1/04). In spite of all of this, Respondent refused even to participate in the hearing, a refusal the appellate court forgave, even though the court found no bias in the school board.

of various post-termination remedies when those are the *only* remedies provided. They provide no support for the Seventh Circuit's wholesale condemnation of state court breach of contract relief as adequate post-termination process where pre-termination process is also provided.[3]

In *Loudermill*, the state provided an administrative hearing as its post-termination process, and this Court endorsed the sufficiency of such a system. Respondent never explains why an administrative remedy provides greater process than a judicial one, although that appears to be a key component of his argument. Indeed, this Court and lower courts have repeatedly acknowledged that state courts play an important role in satisfying the requirements of due process. In *Daniels v. Williams*, 474 U.S. 327 (1986), for example, the Court held that the proper remedy for a prisoner injured by a guard's carelessness was a state-law action for tort – and, in particular, that due process was not implicated so long as the state court process was available.

State judicial process has been recognized as an integral part of due process in other contexts, as well. In *Graham v. City of Philadelphia*, 402 F.3d 139 (3d Cir. 2005), the Third Circuit held that a state court acquittal on criminal charges satisfied any due process requirement for a "name-clearing" hearing to protect a liberty reputational interest. *See also Greene v. Finley*, 749 F.2d 467 (7th Cir. 1984). The Seventh Circuit also held that state procedures and remedies are an integral part of the due process calculus in *Strasburger v.*

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[3] Respondent has apparently chosen not to argue the merits of the Seventh Circuit's novel claim that an independent right of reinstatement is also created by its "present entitlement" theory. As Petitioners argue in their petition, this so-called right not only conflicts with numerous other appellate decisions, it also constitutes a significant misapprehension of the nature of the property interest involved in public employment.

Board of Education, 143 F.3d 351, 358 (7th Cir. 1998). "State law remedies in theory can satisfy due process as well as federal ones, so we require plaintiffs seeking federal remedies to show the state's remedies lacking." *Id.*

It besmirches the dignity of state courts to suggest - as the appellate court held here - that they are constitutionally incapable of providing adequate and prompt post-termination process. To the contrary, they are the most appropriate to address these disputes, where the property interest arises out of a contract and the issue is whether state contract law permits the termination. As Respondent himself admits, this Court should "help to make sure that employment disputes will be resolved in state court where they belong." (Opp. at 24). To the extent Respondent raises a concern regarding efficiency and judicial economy (Opp. at 23), that concern is best alleviated by allowing state courts to hear these disputes in the first instance.

Both the opinion below and Respondent attempt to justify the disparagement of the state courts by claiming that, as a matter of law, state court processes can never be prompt enough to satisfy due process in an employment case. This is clearly incorrect. In the cases discussed above, where court proceedings were considered as part of the state's provision of due process, normal court deadlines were not found to violate a party's due process rights. Further, Respondent has never provided any support for his claim that these cases will take a minimum of two years to try. He presents no citation to the record below, and indeed, cannot, as he presented no evidence below to support that assertion. To the contrary, the Department of Justice has found that in state courts sitting in the 75 largest counties in the country (which Respondent suggests were the slowest), 77% of contract cases tried to the bench (and 57% tried to a jury) are completed in less than the "minimum" two years of which Respondent complains.

Thomas H. Cohen & Steven K. Smith, *Civil Justice Survey of State Courts, 2001: Civil Trial Cases and Verdicts in Large Counties, 2001,* Bureau of Justice Statistics Bulletin 8, Figure 2 (April 2004) (visited June 22, 2005) <http://www.ojp.usdoj.gov/bjs/pub/pdf/ctcvlc01.pdf>. Nor is there any basis upon which to conclude that the courts of Jo Daviess County – which is certainly not one of the country's 75 largest counties – could not resolve Respondent's claim for breach in a much shorter time. There is furthermore no reason to presume that a local state court, even with a full docket, would deny a reasonable request to expedite a particular case if a party made such a request. Thus, there is no basis to reject state court proceedings as adequate post-termination relief on the basis of timeliness of the relief.

The Seventh Circuit's decision in this case is based on a fundamental misconception of *Loudermill* and its progeny, and on a misapprehension of the role of state courts in providing the process due from the state in a fourteenth amendment claim by a public employee. For these reasons, this Court should grant the petition.

C. The Seventh Circuit's Decision Conflicts With Decisions of Other Courts of Appeals.

Respondent's second claim is that the Seventh Circuit's decision does not conflict with the decisions of other circuits, and indeed, he cites several cases which he claims support the court's decision below. He fails, however, to address the numerous cases cited by Petitioners demonstrating the conflict that exists. That conflict arises because the Seventh Circuit explicitly held that a public employee has a right to remain in office that can be protected only by a proceeding that can ensure reinstatement. This position has been clearly rejected by numerous courts of appeals, all of whom reject such a "right." Furthermore, this Court's decision in *Gilbert v. Homar*, 520 U.S. 924 (1997), clearly rejected this notion of

a "right to remain in office" by authorizing suspensions, even without pay, in limited circumstances, with no process at all.

None of the cases cited by Respondent as being consistent with the decision below (Opp. at 18-21) addresses the question whether state court actions constitute adequate post-termination process. Nor do any require a post-termination remedy that includes reinstatement, as the Seventh Circuit does, nor do they find that state court proceedings are not sufficiently prompt. Rather, these cases address a myriad of *other* procedural due process concerns: student expulsions (*e.g., Camlin v. Beecher Community School School*, 339 Ill.App.3d 1013, 791 N.E.2d 127 (3rd Dist. 2003)); administrative review boards (*see Case v. Shelby County Civil Service Merit Board*, 98 S.W.3d 167 (Tenn. Ct. App. 2002)); the proper notice to be given in a pre-termination proceeding (*Calhoun*[4] *v. Gaines*, 982 F.2d 1470 (10th Cir. 1992)); the standards for judging pre-termination hearings where *no* post-termination process is available (*Copelin-Brown v. New Mexico State Personnel Office*, 399 F.3d 1248 (10th Cir. 2005); *McClure v. Independent School District No. 16*, 228 F.3d 1205 (10th Cir. 2000)); and the inadequacy of a meeting with the agency head as post-termination process (*Garraghty v. Commonwealth of Virginia*, 52 F.3d 1274 (4th Cir. 1995)).

Thus, while Respondent argues that the appellate court's decision is "consistent with the overwhelming weight of federal and state authority interpreting *Loudermill*," (Opp. at 18), the cases he cites do not support that claim. To the contrary, the Seventh Circuit's decision conflicts with the well-settled principles established in *Loudermill* and twenty years of appellate decisions applying those principles.

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[4] Miscited in Respondent's Opposition as *California* [sic] *v. Gaines*. (Opp. at 19).

D. The Denial of Qualified Immunity Violates This Court's Requirement of a "Clearly Established" Constitutional Violation.

Respondent fails to address the argument regarding qualified immunity in any meaningful way, neglecting to cite any of this Court's most significant qualified immunity decisions, from *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), and *Anderson v. Creighton,* 483 U.S. 635 (1987), to such recent cases as *Saucier v. Katz,* 533 U.S. 194 (2001), and *Brousseau v. Haugen,* 125 S.Ct. 596 (2004). More important than his failure to cite these cases, Respondent never acknowledges their requirements. Indeed, like the opinion below, Respondent argues that, although *Loudermill* and its progeny required that some post-termination process be provided, and no case had ever held that the post-termination process available – a full trial in state court – failed to meet the requirements of *Loudermill*, these defendants nonetheless should have been able to foretell the Seventh Circuit's decision. This directly contravenes *Saucier*.

Both Respondent and the appellate court have made it plain that they dislike these school board members, and believe that their behavior was, as Respondent repeated numerous times, "petty and maladroit." That, however, is not now, and never has been the standard for a denial of qualified immunity for local public officials. The court below, as did the District Court before it, found that these defendants had not acted with bias, and made no finding that they were acting in any way with subjective bad faith, although the Respondent seems to argue that point in his brief. In any event, this Court long ago rejected the subjective bad faith standard that Respondent now appears to advocate as his only explanation for the denial of qualified immunity. *Harlow*, 457 U.S. at 815-818. Simply disliking the defendants, and disagreeing with their decision to

terminate a superintendent they found to be wholly unsuited for his position, is no basis for denying the immunity to which they are entitled. Accordingly, in addition to the grounds for hearing this case on its merits, this Court should grant certiorari to resolve the confusion caused by the opinion below regarding the standards for denying qualified immunity to local public officials.

CONCLUSION

In urging this Court to deny the petition for certiorari, Respondent argues that doing so will "help make sure that employment disputes will be resolved in state court where they belong." (Opp. at 24). Petitioners share the sentiment that these cases belong in state court. Only by granting the petition and reversing the Seventh Circuit, however, will this Court ensure that result. For the reasons stated above, and in the petition for certiorari, the Board of Education and its individual board members respectfully request that this Court grant the petition for certiorari.

Respectfully submitted,

Nancy Fredman Krent
Counsel of Record
Robert E. Swain
Hodges, Loizzi, Eisenhammer,
Rodick & Kohn
3030 Salt Creek Lane, Suite 202
Arlington Heights, Illinois 60005
Phone: (847) 670-9000

Stephen R. Miller
Laura L. Scarry
Myers, Miller and Krauskopf
Two North LaSalle Street, Suite 1200
Chicago, Illinois 60602
Phone: (312) 345-7250

Counsel for Petitioners